85-2168

No. .....

Supreme Court, U.S.
FILED
JUL 2 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JAMES N. FLEMING,

Petitioner,

v.

W. BEDFORD MOORE, III,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

D. ALAN RUDLIN
W. JEFFREY EDWARDS
Hunton & Williams
P.O. Box 1535
Richmond, Virginia 23212
(804) 788-8200

J. BENJAMIN DICK
Suite 2
421 Park Street
Charlottsville, Virginia 22901

GERALD E. POINDEXTER
Surry Courthouse Square
Surry, Virginia

J. LEVONNE CHAMBERS
ERIC SCHNAPPER*
NAACP Legal Defense & Educational Fund, Inc.
16th Floor
99 Hudson Street
New York, New York 10013
(212) 219-1900

SAMUEL W. TUCKER
Hill, Tucker & Marsh
P.O. Box 27363
Richmond, Virginia 23261

*Counsel of Record

Attorneys for Petitioner

10 pp

QUESTIONS PRESENTED

1. What types of statements constitute expressions of "opinion" that are absolutely privileged under the First Amendment?

2. Where a white plaintiff brought suit for libel against a black man who had asserted the plaintiff was prejudiced against blacks, was the award by an all-white jury of $233,333 in actual and punitive damages so excessive as to violate the First Amendment?

3. In a civil case involving sensitive racial issues, is the deliberate use of peremptory challenges by a white plaintiff to remove all blacks from the jury forbidden by Batson v. Kentucky, No. 84-6263?

4. Is the decision of the Virginia Supreme Court inconsistent with Bose Corp. v. Consumers Union, 80 L.Ed.2d 502 (1984)?

Parties

The parties to this action are James N. Fleming and W. Bedford Moore, III.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties	iii
Table of Authorities	vi
Opinions Below	1
Jurisdiction	3
Constitutional Provisions Involved	4
Statement of the Case	4
Manner in Which the Federal Questions Were Raised Below	18
Reasons for Granting the Writ	21
I. Certiorari Should Be Granted to Resolve A Conflict Among the Lower Courts Regarding the Scope of Constitutionally Protected "Opinion" Under Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).....	21

Page

II. The Award of $233,333 Is So Excessive to Violate the First Amendment..... 47

III. Certiorari Should Be Granted to Decide Whether Batson v. Kentucky Applies to Civil Litigation Regarding Racial Issues 53

IV. The Decision Below is Inconsistent With Bose Corp. v Consumers Union, 80 L.Ed.2d 502 (1984) 58

Conclusion 63

Table A: Lower Court Opinion Regarding Constitutionally Protected Expressions of Opinion, 1974-1986..... 1a

Table B: Virginia Libel Appeals, 1925-1986..... 22a

Table of Authorities

Cases **Page**

Anton v. St. Louis Suburban Newspapers, 598 S.W.2d 493 (Mo. App. 1980) 25,36,40

Batson v. Kentucky, No. 84-6263 ..... i,53-57

Benjamin v. Cowles Publishing, 10 Media L. Rep. 1970 (Wash. App. 1984) 32

Blackhawk Corp. v. Ewing, 94 Cal. App. 3d 640, 156 Cal. Rptr. 581 (1979) 33

Block v. Desert Sun, 6 Media L. Rep. 1367 (Cal. App. 1980) 38

Bock v. Zittenfield, 60 Or. App. 97, 672 P.2d 1237 (1983) 40

Booker v. Jabe, 775 F.2d 762 (6th Cir. 1985) 55

Bose Corp. v. Consumers Union, 80 L.Ed.2d 502 (1984) ii,24,58-60,63

Page

Bose Corp. v. Consumers Union, 692 F.2d 189 (1st Cir. 1982) 24,28

Brower v. New Republic, Inc., 7 Media L. Rep. 1605 (N.Y. Sup. Ct. 1981) 44

Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976) 27

Burns v. Denver Post Co., 606 P.2d 1310 (Ariz. 1980) 36,37

Burns v. McGraw-Hill Broadcasting Co., Inc., 659 P.2d 1351 (Colo. 1983) 25,28,29,31

Caron v. Bangor Publishing Co., 470 A.2d 782 (Me. 1984) 40

Chalpin v. Amordian Press, 12 Media L. Rep. 1422 (N.Y. Sup. Ct. 1985) 36,40

Church of Scientology v. Cazares, 638 F.2d 1272 (5th Cir. 1981) 39

Cianci v. New Times Publishing Co., 639 F.2d 54 (2d Cir. 1980) 30,38

Costello v. Capital Cities Media, 9 Media L. Rep. 1434 (Ill. App. 1982) 39

	Page
Davis v. Ross, 754 F.2d 80 (2d Cir. 1985)	27,41
Economy Carpets v. Better Business Bureau, 361 So.2d 234 (La. 1978)	35
Edwards v. National Audubon Society, 566 F.2d 113 (2d Cir. 1977)	24,39
First Bank of Corpus Christi v. Ake, 606 S.W.2d 698 (Tex. Civ. App. 1980)	39
Fleming v. Albemarle County, Civil Action No. 75-11(c) (W.D. Va.)	6
Fleming v. Benzaquin, 454 N.E. 2d 95, 390 Mass. 175 (1983)	31
Fleming v. Citizens for Albemarle, Inc., 577 F.2d 236 (4th Cir. 1978)	8,44
Foote v. Sarafyan, 432 So.2d 877 (La. App. 4th Cir. 1982)	40
From v. Tallahassee Democrat, Inc., 400 So.2d 52 (Fla. App. 1981)	30

Page

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 19-23,27, 34,41,47

Good Government Group of Seal Beach v. Superior Court, 586 P.2d 572, 150 Cal. Rptr. 258 (1978) 37

Goodrich v. Waterbury Republican-American, 448 A.2d 1317, 188 Conn. 107 (1982) 23,26,34

Greer v. Columbus Monthly, 8 Media L. Rep. 2129 (Ohio Ct. App. 1982) 35

Gregory v. McConnell Douglas Corp., 17 C.3d 596, 131 Cal. Rptr. 641, 552 P.2d 425 (1976) 33

Hamm v. South Carolina, 409 U.S. 524 (1973) 57

Havalunch v. Mazza, 294 S.E.2d 70 (W. Va. 1981)..... 23

Hay v. Independent Newspapers, Inc., 450 So.2d 293 (Fla. App. 2 Dist. 1984)..... 31,38

Henry v. Halliburton,690 S.W.2d 775 (Mo. 1985) 25,40

Page

Holy Spirit Ass'n v. Sequoia Elsevier Publishing Co., 426 A.D.2d 759 (1980) 43

Hotchner v. Castillo-Poche, 551 F.2d 910 (2d Cir. 1977) 27,36

Information Control Corp. v. Genesis Computer Corp., 611 F.2d 781 (9th Cir. 1980) 32,34

Iverson v. Crow, 639 S.W.2d 118 (Mo. App. 1982)..... 38

Janklow v. Newsweek, 12 Media L. Rep. 1961 (8th Cir. 1986)(en banc) 24,31,34,35,37

Kapiloff v. Dunn, 340 A.2d 251 (Md. Ct. Sp. App. 1975) 36

Keller v. Miami Herald Pub. Co., 778 F.2d 711 (11th Cir. 1985) 26,31

Lauderback v. American Broadcasting Companies, 741 F.2d 193 (8th Cir. 1984) 24,38,39

Letter Carriers v. Austin, 418 U.S. 264 (1974) 49

Lewis v. Time, Inc., 710 F.2d 549 (9th Cir. 1983) 35,38,40

Page

Lins v. Evening News, 9 Media L. Rep. 2380 (Mich. Ct. App. 1983) 44

Lorain Journal Co. v. Milkovich, 88 L.Ed.2d 305 (1985) 22

MacConnell v Mitten, 638 P.2d 689 (Ariz. 1981) 37

Marchiondo v. Brown, 649 P.2d 462, 98 N.M. 394 (1982) 32

Mashburn v. Collin, 355 So.2d 879 (La. 1977) 23,35

Maule v. N.Y.M. Corporation, 429 N.Y.S.2d 891, 76 A.D. 58 (1980) 41

McCray v. Adams, 581 F.Supp. 493 (E.D.N.Y. 1984) 55

McHale v. Lake Charles American Press, 6 Media L. Rep. 2478 (La. App. 1980) 40

Medeiros v. Northeast Publishing, 8 Media L. Rep. 7500 (Mass. Super. Ct. 1982) 44

Miami v. Cornett, ___ So.2d ___ (No. 81-85, Fla. D. Ct. App.) (Jan. 29, 1985) 55

Milkovich v. News Herald, 473 N.E.2d 1191, 15 Ohio St.3d 292 (1984) 39

	Page
Miller v. Charleston Gazette, 9 Media L. Rep. 2540 (Cir. Ct. W. Va. 1983)	40
Miskovsky v. Oklahoma Publishing Co., 459 U.S. 923 (1982)	23
Mr. Chow of New York v. Ste. Jour Azur, S.A., 759 F.2d 219 (2d Cir. 1985)	23,27,30
Myers v. N.Y.M. Corporation, 429 NY.S.2d 891, 76 AD 58 (1980)	41
Nash v. Keene Publishing Corp., 10 Media L. Rep. 2281 (N.H. Supr. Ct. 1984)	31
National Association of Letter Carriers v. Austin, 213 Va. 377 (1972)	49
National Association of Government Employees v. Central Broadcasting Corp., 396 N.E. 996 (Mass. 1979)	36
New Deal Restaurant v. WPIX, 11 Media L. Rep. 1965 (N.Y. Sup. Ct. 1985)	36
New Testament Missionary Fellowship v. Dutton, 9 Media L. Rep. 1174 (N.Y. Sup. Ct. 1982)	43

Page

New York Times v. Sullivan, 376 U.S. 254 (1964) 20,47,60,62,63

Okun v. Superior Court, 20 Cal.2d 442, 175 Cal. Rptr. 157, 629 P.2d 1369 (1981) 40

Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984)(en banc) ... 25,26,30-32, 34,44

Ollman v. Evans, 86 L.Ed.2d 278 (1985) 23

Orr v. Argus-Press Co., 586 F.2d 1108 (6th Cir. 1978) 28,38,39

Pease v. Telegraph Publishing Co., 426 A.2d 463 (N.H. 1981) ... 44

Phoenix Newspapers v. Church, 425 U.S. 908 (1976) 23

Pierce v. Capital Cities Communications, Inc., 576 F.2d 494 (3d Cir. 1978) 37

Pritsker v. Brundney, 452 N.E.2d 227 (Mass. 1983)..... 30

Redco Corp. v. CBS, 11 Media L. Rep. 1861 (3d Cir. 1985) 28

Renwick v. News and Observer Pub. Co., 304 S.E.2d 593 (N.C. 1983) 24,26,45

	Page
Rinaldi v. Holt, Rinehart, 42 N.Y.2d 369 (1977)	36,37
Rinsley v. Brandt, 700 F.2d 1304 (10th Cir. 1983)	28
Ste. Amant v. Thompson, 390 U.S. 727 (1968).....	52
Shelley v. Kramer, 334 U.S. 1 (1948)	55
Silsdorf v. Levine, 85 A.D. 297, 447 N.Y.S.2d 936 (1981)	29,38
Smith v. Taylor County Publishing Co., 443 So.2d 1042 (Fla. App. 1 Dist. 1983)	31
Spelson v. CBS, 11 Media L. Rep. 1900 (7th Cir. 1985)	40
Stones River Motors, Inc. v. Mid-South Publishing Co., 651 S.W.2d 713 (Tenn. App. 1983)	35,40
Swain v. Alabama, 380 U.S. 202 (1965)	53,54
Time, Inc v. Firestone, 424 U.S. 448 (1976)	61

Page

Thiel v. Southern Pacific Co., 328 U.S. 217 (1946) 56

Turner v. Murray, 90 L.Ed.2d 27 (1985) 57-58

United States Postal Service v. Aikens, 460 U.S. 71 (1983) 46

Wright v. Corfield, 146 Va. 637 (1926) 49

Statutes and Constitutional Provisions

First Amendment, U.S. Constitution 4,18,21,47,59,60

Fourteenth Amendment, U.S. Constitution 4,18,59,60

28 U.S.C. § 1257 4

Code Va. § 18.2 50

Restatement of Torts (Second) (1976) 28-30,34,42

W. Prosser, Handbook of Torts (4th ed. 1971) 25

J. tenBreck, Equal Under Law (1969) 43

Page

Carman, "Hutchinson v. Proxmire and the Neglected Fair Comment Defense: An Alternative to 'Actual Malice'", 30 De Paul L. Rev. 1 (1980) 25

Note, The Fact - Opinion Distinction in First Amendment Law: The Need for a Bright-Line Rule, 72 Geo. L. J. 1817 (1984) 24

Note, Fact and Opinion After Gertz v. Robert Welch, Inc.: The Evolution of a Privilege, 34 Rutgers L. Rev. 81 (1981) 25

==========

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

==========

The petitioner James N. Fleming respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Virginia entered in this proceeding on January 24, 1986, and the decisions and orders on which that 1986 judgment was based.[1]

OPINIONS BELOW

This action has been the subject of three separate trial court proceedings and appeals, each of which is described below.

---

[1] The opinion of January 24, 1986, finally resolving this case was the last of a series of Virginia Supreme Court orders and decisions dating from 1982. The questions presented by this petition encompass issues that were addressed in those earlier interlocutory orders and opinions.

Following the first jury trial in this action, the Virginia Circuit Court entered on April 28, 1978, an unpublished Final Judgment Order, which is set out at pp. 1-9 of the Appendix. The decision of the Virginia Supreme Court reversing that Order and remanding for a new trial was issued on March 6, 1981; that opinion is reported at 221 Va. 884, 275 S.E.2d 632 (1981), and is set out at pp. 10-32 of the Appendix.

On June 3, 1983, after a second jury trial, the Circuit Court issued an unpublished Final Judgment Order (App. 33-39). On June 8, 1984, the Virginia Supreme Court issued an unpublished order granting petitioner leave to appeal to that court, but limiting the issues which would be considered on appeal. (App. 50-53). The February 1, 1985 decision of the Virginia Supreme Court in that appeal,

sustaining the finding of liability but directing a remittitur, is reported at 325 S.E.2d 713, ___ Va. ___ (1985). (App. 56-114).

Following a hearing on the amount of the remittitur the Circuit Court, in an unpublished Final Judgment Order of May 13, 1985, fixed the amount of the remittitur. (App. 122-125). The Virginia Supreme Court on January 24, 1986, refused the petition for appeal (App. 127-128), and on March 7, 1986, denied a petition for rehearing (App. 129-130); neither of these orders is officially reported.

JURISDICTION

The order of the Virginia Supreme Court refusing the petition for appeal was entered on January 24, 1986. A timely petition for rehearing was denied on March 7, 1986. On May 27, 1986, the Chief Justice granted an order extending the

time for filing this petition until July 5, 1986. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law ... abridging the freedom of speech, or of the press....

Section 1 of the Fourteenth Amendment provides in pertinent part:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This litigation arises out of a bitter public controversy that occurred in Albemarle County, Virginia, in the mid

1970's. The dispute was triggered by a proposal by petitioner, a black developer, to build a subdivision of low and moderate income homes, a development which he expressly announced would be open to and affordable by blacks as well as whites. Other subdivisions proposed by white developers had been approved in the county. Local officials and residents tenaciously opposed and ultimately succeeded in preventing construction of petitioner's proposed moderately priced development.

The protracted and divisive dispute that surrounded this project was permeated by charges and counter charges of racism. In January, 1975, in the face of escalating opposition to his proposed project, petitioner sent to the county Board of Supervisors a letter complaining that his project had been treated differently than

previous projects, and asserting that that differing treatment was a result of petitioner's race and the race of the blacks who might live in the proposed development. (Tr. 143-45). A local newspaper in turn denounced petitioner, asserting that his letter to the Board of Supervisors was itself "neatly camouflaged racism" (DX 8).

Petitioner's initial proposal was disapproved by the county Board of Supervisors in January, 1975. In March, 1975, petitioner filed a civil action in the United States District Court alleging that his proposal had been rejected as a result of racial discrimination.[2] While this federal action was pending, petitioner submitted a second, somewhat modified proposal to county authorities,

---

[2] Fleming v. Albemarle County, Civil Action No. 75-11 (C) (W.D. Va.).

but it too was rejected. The federal action was tried in April, 1976. The testimony at the federal trial revealed direct evidence of racial motivation on the part of the county officials who had disapproved the proposed development, which was to have been located near a county reservoir. In private meetings those local officials had given the following explanation of their reasons for disapproving the project:

> "[C]an you imagine two or three hundred niggers out there on the reservoir on truck inner tubes."
>
> "Nobody around here wants a bunch of niggers shitting in the drinking water."[3]

---

[3] Id., transcript of April 21, 1976, pp. 17, 171. There was no testimony at this federal trial that respondent was present when these remarks were made.

In the wake of this testimony, the district judge announced that he was convinced that the disapproval of the project was the result of "hanky-panky," and urged the defendant officials to settle the litigation.[4]

On April 26, 1976, the county officials agreed to a settlement providing for the rezoning petitioner had sought for his project. Immediately afterward, however, the chairman of the Board of Supervisors announced a moratorium on any construction in the area (Tr. 516), and several organizations intervened in the federal action seeking to overturn the settlement. (See n. 4, supra) This pattern of resistance to the proposed

---

[4] See Fleming v. Citizens for Albemarle, Inc., 577 F.2d 236, 238 (4th Cir. 1978), cert. denied, 439 U.S. 1071 (1979).

development continued for several years until petitioner eventually abandoned the project and sold the land to the Nature Conservancy for use as a public park.

Respondent Bedford Moore, the plaintiff in this libel action, was characterized by his attorney as "a leader of the opposition" to the proposed construction (Tr. 289), and was described by the director of the county Planning Commission as "one of the principal antagonists" of the project. (Tr. 442). Moore was a prominent local resident and the owner of a 100 acre estate abutting the site of the proposed development. Moore personally spoke in opposition to the development at meetings of the Planning Commission and Board of Supervisors,[5] and an attorney representing Moore

[5] Tr. 79, 142, 143, 264.

spoke for him at other official meetings. (Tr. 264, 333). Moore also discussed the project with the staff of the Planning Commission and with a member of the Board of Supervisors. (Tr.110, 509, 512). Following the April 26, 1976, consent agreement, Moore was among those who contacted the attorney who intervened to overturn the agreement, and Moore and his wife were members, respectively, of the two organizations on behalf of which intervention was successfully sought. (Tr. 106, 287-88). Because the Board of Supervisors regarded Moore as one of the principal opponents of the project, the Board on several occasions requested that Moore meet with petitioner to attempt to reach an agreement regarding aspects of the disputed project. (Tr. 106, 118). These negotiations, however, ultimately proved unsuccessful.

The particular event that triggered the instant litigation occurred in January, 1976. On January 14, 1976, the Board of Supervisors voted to impose a moratorium on construction in the area at issue, thus effectively rejecting petitioner's then pending proposal. Two days later petitioner published in a local newspaper a paid advertisement denouncing the opponents of the project. (App. 192-194) . Most of the advertisement was directed at unnamed "greedy people" whose attitude was "I've got mine -- too bad about you." Petitioner argued that the proposed project would "provide housing and pleasant surroundings for working people", and that it was being resisted by "no-growth people" who already were fortunate enough to own homes. The advertisement specifically referred to respondent Moore as one of those "who

wants to deprive working people" of the opportunity to live in decent housing, and asserted that Moore "does not want any black people within ... sight" of his home. The advertisement was headed "Racism".

In January, 1977, respondent Moore commenced this action in Virginia Circuit Court, claiming that the 1976 advertisement was libelous. In 1978 an all-white jury agreed and awarded respondent $10,000 in actual damages and $100,000 in punitive damages. On appeal the Virginia Supreme court held that the trial judge had erred in ruling that the advertisement was defamatory per se, and remanded for a new trial. (App.10-29). The majority opinion did not discuss whether the advertisement might constitute a statement of opinion that was constitutionally protected from attack in a libel action. Justice Harrison

dissented, arguing that the substance of the advertisement was the sort of hyperbole that could not constitute libel.[6] Justice Harrison also expressed the view that the jury award of $110,000 was so large as to be "shocking." (App. 30).

On remand petitioner moved to dismiss this action on the ground that the disputed advertisement was a constitutionally protected expression of opinion. The trial judge refused to decide whether the advertisement was constitutionally

---

[6] "I attach little significance to the word 'racism' which heads the advertisement. The words 'racism' and 'racist' are bandied about in our society with complete abandon.... Indeed, it would not be difficult to find a newspaper which contains a complaint by one party against another for some action allegedly grounded in 'racism', or 'reverse racism'..... The language of the market place is not always restrained, reasonable, or temperate.... [W]e should not allow the publication here to be the predicate of an action for libel...." (App. 30-32).

protected. Although the 1981 state Supreme Court opinion contained no reference whatever to this issue, the trial judge construed that 1981 decision to require that the case be set for retrial, and to preclude dismissal on any constitutional ground. (App. 135-37).

At the outset of the 1982 trial, counsel for respondent Moore, over petitioner's objection, exercised his peremptory challenges to remove all blacks from the jury, as he had during the 1978 trial. The substance of the 1982 trial was largely a reprise of the contentions that were aired in the earlier public controversy. Respondent Moore insisted that he had opposed the housing development solely because of environmental and other legitimate concerns, and that he was not biased against blacks. Petitioner steadfastly maintained, as he had in 1976,

his belief that Moore and others had opposed the project for racial reasons. In reply Respondent Moore's lawyer argued to the jury that petitioner's charge of discrimination was itself a "racist hoax". (Tr. 583). Moore acknowledged that the advertisement had not caused him any financial loss whatsoever, but asserted that the charge of discrimination was an attack on his "honor". (Tr. 89, 150). The jury found for respondent, and awarded him $100,000 compensatory damages, $250,000 punitive damages and 12% interest on the punitive damages, a total of approximately $591,000.

Petitioner sought leave to appeal to the Virginia Supreme Court on a variety of issues. That court expressly declined to entertain an appeal as to most of those issues, refusing to decide whether the advertisement was a constitutionally

protected statement of opinion, or whether the deliberate use of peremptory challenges to exclude black jurors in a civil suit was unconstitutional. (App. 263-72). The Virginia Supreme Court granted leave to appeal only the amount of the verdict and the sufficiency of the evidence to support an award of punitive damages. (App. 50-53). With regard to those issues the state court held that, because petitioner lacked an "objective" basis on which to allege racial discrimination, the making of that charge necessarily involved "actual malice." The state court also concluded, however, that the amounts of actual and punitive damages awarded were excessive, and remanded the case to the trial court to set an appropriate remittitur. (App. 86-106).

On remand the Circuit Court directed the respondents to remit all but $233,333.34 of the original judgment (App. 118-26). Petitioners sought leave to appeal, arguing the verdict was still excessive, but the Virginia Supreme Court denied leave to appeal. (App. 127-8). A timely petition for rehearing was also denied. (App. 129-30).

During the pendency of this litigation in the Virginia state courts petitioner twice sought certiorari to review interlocutory decisions of the Virginia Supreme Court. The first petition, seeking review of the Virginia Supreme Court's order limiting the issues to be considered in the 1985 appeal, was denied on October 29, 1984. 83 L.Ed.2d 302 (No. 84-382). Respondent expressly argued that

that petition was premature.[7] Following the 1985 decision remanding the case for a remittitur hearing, petitioner again sought certiorari. No. 84-1740. That petition was denied on June 24, 1985. 87 L.Ed.2d 643.

MANNER IN WHICH THE FEDERAL QUESTIONS WERE RAISED BELOW

In a motion to dismiss argued prior to the 1982 trial, petitioner asserted that the advertisement was an expression of opinion "protected by the First Amendment," (App. 196, 134-35, 137-39), an argument reiterated in a similar motion argued during the trial. (App.242-44) Petitioner's 1983 Petition for Appeal to the Virginia Supreme Court asked that

---

[7] Brief in Opposition, No. 84-382, pp. 1-7.

court to decide the same issue (App. 263, 265), as did petitioner's January 30, 1986 petition for rehearing. (App. 280).

Petitioner objected at the 1982 trial to respondent's use of peremptory challenges to ban all blacks from the jury (App. 149-50), and in a post-trial motion argued that the manner in which those challenges had been used violated his federal constitutional rights. (App. 190, 225-32). In his 1983 petition for appeal petitioner asked the Virginia Supreme Court to decide whether the use of those challenges had violated the Fifth and Fourteenth Amendments. (App. 265, 267).

Following the 1982 jury verdict, petitioner moved to set aside the verdict on the ground that it was so excessive as to be unconstitutional under Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (App. 215-16, 218-20, 250-57). Peti-

tioner's 1983 petition for appeal and 1984 brief in the Virginia Supreme Court reiterated that same constitutional contention. (App. 269-71, 273-76). Following the remittitur order of the circuit court, petitioner's 1985 petition for appeal argued that the modified verdict was still inconsistent with Gertz. (Petition for Appeal, No. 85-0622, pp. 15, 17).

During the 1982 trial petitioner repeatedly argued that respondent Moore was a public figure within the meaning of New York Times v. Sullivan, 376 U.S. 254 (1964), that respondent had failed to demonstrate the existence of the requisite malice, and that the action was therefore barred by the First Amendment. (App. 233-50. Subsequently petitioner moved to set aside the verdict on the same ground

(App.188-89), and asked the Virginia Supreme Court to review that federal constitutional question. (App. 264-67).

REASONS FOR GRANTING THE WRIT

(1) Certiorari Should Be Granted To Resolve A Conflict Among the Lower Courts Regarding the Scope of Constitutionally Protected "Opinion" Under Gertz v. Robert Welch, Inc., 418 U.S. 373 (1974)

In 1974 this Court held in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), that expressions of opinion enjoy absolute protection under the First Amendment.[8] Since that time the twelve circuit courts of appeals, as well as courts in at least 34 states,[9] have reached widely divergent

---

[8] "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." 418 U.S. at 339-40.

[9] A complete list of the lower court cases since 1974 discussing the scope of the

conclusions regarding what types of statements are constitutionally protected expressions of "opinion." In 1984-85 alone there were some 40 reported lower court decisions on this issue.[10] Recognizing the importance of this issue, and the conflicting interpretations of Gertz that have emerged among the lower courts, six members of this Court have already voted on various occasions to grant certiorari to clarify the scope of the constitutional protection afforded to expressions of opinion.[11]

---

constitutional protection afforded to opinions is set forth in Table A printed as an appendix to this brief.

[10] See Table A, infra.

[11] Lorain Journal Co. v. Milkovich, No. 84-1731, cert. denied, 88 L.Ed.2d 305 (Nov. 4, 1985) (Brennan J. and Marshall, J., dissenting from denial of certiorari) (The third question presented by the petition read, "Is First Amendment privilege covering expressions of opinion abridged where federal and state courts in Ohio are bound by conflicting precedents

The nature of the opinion privilege recognized by Gertz is widely regarded as one of the most thoroughly confused issues of contemporary constitutional law. The lower courts have described the case law since Gertz[12] as "nebulous",[13] "murky",[14] "uncertain" "unpredictable",[15] an "area of

---

in determining the scope of protected opinion?"); Ollman v. Evans, No. 84-1524, 86 L.Ed. 278 (May 28, 1985) (Rehnquist, J., and Burger, C.J., dissenting from denial of certiorari); Miskovsky v. Oklahoma Publishing Co., 459 U.S. 923 (1982) (Rehnquist, J. and White, J., dissenting from denial of certiorari); Phoenix Newspapers v.Church, 425 U.S. 908 (1976)(Burger, C.J. and Blackmun, J., dissenting from denial of certiorari).

12 Goodrich v. Waterbury Republican-American, 448 A.2d 1317, 1221, 188 Conn. 107 (1982).

13 Mr. Chow of New York v. Ste. Jour Azur S.A., 759 F.2d 219, 224 (2d Cir. 1985).

14 Mashburn v. Collin, 355 So.2d 879, 885 (La. 1977).

15 Havalunch v. Mazza, 294 S.E.2d 70, 73 (W. Va. 1981).

total confusion",[16] and "difficult" or "nearly impossible" to understand and apply.[17] Commentators have been even more harsh in their description of the widely divergent lower court decisions, characterizing the varying standards applied by those courts as "contradictory and confused,"[18] "an invitation to error,

---

16 Janklow v. Newsweek, 12 Media L. Rep. 1961, 1967 (8th Cir. 1986) (en banc)(Bowman, J., dissenting) ("Beauty is in the eye of the beholder, and it would appear that the result to be obtained ... is in the eye of the judge").

17 Bose Corp. v. Consumers Union, 692 F.2d 189, 194 (1st Cir. 1982), aff'd 80 L.Ed.2d 502 (1984); Edwards v. National Audubon Society, 556 F.2d 113, 121 n.5 (2d Cir. 1977); Lauderback v. American Broadcasting System, 741 F.2d 193, 195 (8th Cir. 1984); Renwick v. News and Observer Pub. Co., 304 S.E.2d 593, 605 (N.C. App. 1983), rev'd on other grounds, 312 S.E.2d 405, 310 N.C. 312 (1984).

18 Note, The Fact-Opinion Distinction in First Amendment Libel Law: The Need for a Bright-Line Rule, 72 Geo. L.J., 1817, 1853 (1984); see also id. at 1818 ("variety of [lower court] approaches"; "no consensus" on standards; "uncertainty").

uncertainty and inconsistency",[19] "unsatisfactory and unreliable",[20] and marked by "judicial confusion".[21] The lower courts have repeatedly recognized that they are applying conflicting standards,[22] and have

---

19 Note, Fact and Opinion After Gertz v. Robert Welch, Inc: The Evolution of a Privilege, 34 Rutgers L. Rev. 81, 126 (1981).

20 W. Prosser, Handbook of Torts 820 (4th ed. 1971).

21 Carman, "Hutchinson v. Proxmire and the Neglected Fair Comment Defense: An Alternative to 'Actual Malice'", 30 De Paul L. Rev. 1, 13 (1980).

22 Ollman v. Evans, 750 F.2d 970, 978(D.C. Cir. 1984) (en banc) ("courts are divided in their methods of distinguishing between assertions of fact and expressions of opinion"); Burns v. McGraw-Hill Broadcasting Co, Inc., 659 P.2d 1351, 1359 (Colo. 1983)("courts have not uniformly applied the distinction between facts and opinions"); Anton v. St. Louis Suburban Newspapers, 598 S.W.2d 493, 498 (Mo. App. 1980)("courts ... differ" on the scope of the Gertz privilege); Henry v. Halliburton, 690 S.W.2d 775, 787 (Mo. 1985)(en banc) ("courts are divided in their methods of distinguishing between assertions of fact and expressions of opinion...").

bemoaned the lack of further guidance from this Court as to the difference between a statement of opinion and a statement of fact.[23]

The nature of this conflict among the lower court decisions is far more complex than the conflicts usually deemed sufficient to warrant a grant of certiorari. There are more than a dozen different standards being utilized by the lower courts to distinguish between statements of fact and opinion; in recent years the number of constitutional standards has

---

[23] Ollman v. Evans, 750 F.2d at 975 (Supreme Court has "provided little guidance"); Keller v. Miami Herald Pub. Co., 778 F.2d 711, 715 n.11 (11th Cir. 1985)(Supreme Court "has provided little guidance in distinguishing between statements of fact and opinion"); Goodrich v. Waterbury Republican-American, 448 A.2d at 1324, (Supreme Court has not "fully articulated" "[t]he precise contours" of the opinion doctrine); Renwick v. News and Observer Pub. Co., 304 S.E.2d at 605 (Supreme Court decisions "offer little direct guidance")

increased as the state and circuit courts fashioned new hybrid rules from criteria articulated in earlier opinions. The particular standard that will be applied by a given court at times varies unpredictably from case to case,[24] leaving speakers, the media and litigants with little guidance as to what statements are protected by Gertz in a given jurisdiction. Some decisions announce several different standards, with no explanation of which standard would control when they

---

[24] The decisions in the second circuit have utilized such varying criteria. See Buckley v. Littell, 539 F.2d 882, 893 (2d Cir. 1976)(statements are expressions of opinion if the meaning of the words used is characterized by "tremendous imprecision"); Hotchner v. Castillo-Puche, 551 F.2d 910, 913 (2d Cir. 1977)(statement is one of opinion if it cannot be proved true or false); Davis v. Ross, 754 F.2d 80, 86 (2d Cir. 1985)(statement is opinion if it does not imply the existence of unstated defamatory factual premises); Mr. Chow of New York v. Ste. Jour Azur, S.A., 759 F.2d 219, 226 (2d Cir. 1985)(applying the Ollman standards).

yield different results.[25] For these reasons the following assessment of which rules now prevail in which circuits and states involves an unavoidable degree of approximation.

The first, third, sixth, and tenth circuits[26] apply the definition of an opinion set forth in section 566 of the Restatement Torts (Second) (1976).[27] Under

---

[25] See, e.g., Burns v. McGraw-Hill Broadcasting, 659 P.2d 1351, 1358 (standards referred to include whether meaning of statement is speculative), 1358 (Restatement), 1360 (Information Control standards) (Colo. 1983).

[26] Bose Corp. v. Consumers Union, 692 F.2d 194; Redco Corporation v. CBS, 11 Media L. Rep. 1861, 1862 (3d Cir. 1985); Orr v. Argus-Press Co., 586 F.2d 1108, 1114-15 (6th Cir. 1978); Rinsley v. Brandt, 700 F.2d 1304, 1309 (10th Cir. 1983).

[27] "A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis of the opinion". Restatement (Second) of Torts, § 566 (1976).

the Restatement a speaker has an absolute privilege to state what conclusion he has drawn based on disclosed or assumed facts, so long as he or she does not imply the existence of other unstated facts which are false and defamatory. Utilization of the Restatement standards has also been endorsed by approximately seventeen states.[28] These jurisdictions are sharply divided, however, regarding what the Restatement means. Some cases hold that a statement of opinion without an accompanying disclosure of its factual premises is defamatory per se.[29] A second line of

---

[28] Restatement Appendix, v. 4, pp. 364-70 (1981); Cumulative Pocket Part, v. 4, pp. 271-84 (1984); Cumulative Annual Supplement, v. 4, pp. 308-325 (1985).

[29] See, e.g., Burns v. McGraw Hill Broadcasting Co., 659 P.2d 1351, 1359-60 (Colo. 1983)(citing cases); Silsdorf v. Levine, 59 N.Y. 2d 8, 13 (1983)("The immunity afforded the expression of opinion obtains only when the facts supporting the opinion are set forth.")

decisions holds that the mere absence of such stated or assumed facts does not remove the constitutional protection unless the speaker or writer goes further and affirmatively implies that he or she knows some unstated defamatory fact.[30]

The Restatement standard, whatever its meaning may be, has been expressly rejected in the second and District of Columbia Circuits.[31] Those courts[32] now apply the constitutional test formulated by Judge Starr in Ollman v. Evans, 750 F.2d 970 (1984)(en banc), cert. denied 86 L.Ed. 2d 278 (1985). The Ollman standard

---

[30] See, e.g., From v. Tallahassee Democrat, Inc., 400 So.2d 52, 57 (Fla. App. 1981) (opinion not accompanied by statement of facts still constitutionally protected); Pritsker v. Brudnoy, 452 N.E.2d 227, 229 (Mass. 1983)(same).

[31] Cianci v. New Times Publishing Co., 639 F.2d 54, 64-65 (2d Cir. 1980).

[32] See Mr. Chow of New York v. Ste. Jour Azur, S.A., 759 F.2d at 226.

relies on four distinct criteria: the language of the alleged libel, the extent to which the statement is verifiable, and the social and linguistic context in which the statement was made. 750 F.2d at 979-83. The eighth circuit utilizes a multi-part test that incorporates not only the four criteria of the Ollman majority opinion but also certain additional criteria proposed by Judge Bork's concurring opinion.[33]

In Massachusetts, Florida, Colorado, New Hampshire[34] and the eleventh circuit

---

[33] Janklow v. Newsweek, 12 Media L.Rep. at 1962, 1263, 1264 and n. 5.

[34] Fleming v. Benzaquin, 454 N.E.2d 95, 100, 390 Mass. 175 (1983); Smith v. Taylor County Publishing Co., 443 So.2d 1042, 1047 (Fla. App. 1 Dist. 1983); Hay v. Independent Newspapers, Inc., 450 So.2d 293, 295 (Fla. App. 2 Dist. 1984); Burns v. McGraw-Hill Broadcasting Co., Inc., 659 P.2d 1351, 1360 (Colo. 1983); Nash v. Keene Publishing Corp., 10 Media L. Rep. 2281, 2282 (N.H. Supr. Ct. 1984); Keller v. Miami Herald Publishing Co., 778 F.2d 711, 717 (11th Cir. 1985).

courts follow the three part standard established by the ninth circuit in Information Control Corp. v. Genesis Computer Corp. , 611 F.2d 781, 783-84 (9th Cir. 1980). The factors deemed of controlling importance in these jurisdictions are the language of the statement, the facts surrounding the publication, and whether the statement was made in the course of a public dispute. Unlike the Ollman rule, however, verifiabilty is not a consideration. 611 F.2d at 784. Washington and New Mexico courts consider verifiability, the entire language of the statement, and the likely understanding of the audience, but attach no specific significance to the type of controversy in which the statement occurred.[35]

---

[35] Benjamin v. Cowles Publishing, 10 Media L. Rep. 1970, 1973 (Wash. App. 1984); Marchiondo v. Brown, 649 P.2d 462, 469, 98 N.M. 394 (1982).

In California the consideration of overriding importance is whether a disputed remark was made in the context of a public, political or labor dispute, or any similar heated controversy; the courts of that state assume that the audience hearing such remarks would not ordinarily treat them as entirely factual, but could "anticipate ... the ... use of epithets, fiery rhetoric or hyperbole".[36] Thus in California "[s]tatements occurring in the course of a public debate will usually be accorded the status of opinion."[37] The eighth circuit adheres to a similar rule regarding individuals who speak out on

---

[36] Gregory v. McDonnell Douglas Corp., 17 C.3d 596, 601, 131 Cal. Rptr. 641, 552 P.2d 425 (1976).

[37] Blackhawk Corp. v. Ewing, 94 Cal. App. 3d 640, 643, 156 Cal. Rptr. 581 (1979). (Emphasis added).

controversial issues, holding that "those who participate willingly in public debate 'must accept a degree of derogation that others need not.'"[38] In Connecticut "mixed" statements combining assertions of both fact and opinion are constitutionally protected only if "about matters of public interest or concern."[39] Statements made in the course of a public controversy are more likely to be deemed "opinion" in jurisdictions applying the Ollman or Information Control standards, but such a context is of no apparent relevance under the Restatement. Louisiana courts apparently construe Gertz to protect only opinions about "matters of

---

[38] Janklow v. Newsweek, 12 Media L.Rep. at 1964 n.5.

[39] Goodrich v. Waterbury Republican-American, 448 A.2d 1317, 1325 (1982).

public concern"[40] and "persons taking a public position on a matter of public concern,"[41] but the eighth and ninth circuits have expressly rejected the limitation accepted in Louisiana.[42]

Courts in Ohio, Tennessee and Louisiana[43] hold that statements of opinion are constitutionally protected only if those statements are made without malice. In Maryland whether or not an opinion is constitutionally protected also turns to

---

40 Mashburn v. Collin, 355 So.2d 879, 882, 885, 889 (La. 1977); Economy Carpets v. Better Business Bureau, 361 So.2d 234, 240, 242 (La. 1978).

41 Mashburn v. Collin, 355 So.2d at 882.

42 Lewis v. Time, Inc., 710 F.2d 549, 553 (9th Cir. 1983); Janklow v. Newsweek, 12 Media L.Rep. at 1962.

43 Greer v. Columbus Monthly, 8 Media L. Rep. 2129, 2133 (Ohio Ct. App. 1982); Stones River Motors, Inc. v. Mid-South Publishing Co., 651 S.W.2d 713, 723 (Tenn. App. 1983); Mashburn v. Collin, 355 So.2d at 891.

some degree on the good faith of author.[44] The state courts of New York and Missouri, on the other hand, hold that expressions of opinion are constitutionally privileged "even if [the opinions are] falsely and insincerely held."[45]

The second circuit and state court decisions in Colorado, Massachusetts and New York have held that any assertion that cannot be proved true or false is necessarily a privileged expression of opinion.[46] In light of the difficulty of

---

[44] Kapiloff v. Dunn, 340 A.2d 251, 262-63 (Md. Ct. Sp. App. 1975).

[45] Anton v. St. Louis Newspapers, Inc., 598 S.W.2d 493, 499 (Mo. App. 1980); Rinaldi v. Holt, Rinehart, 42 N.Y.2d 369, 381. (1977).

[46] Hotchner v. Castillo-Poche, 551 F.2d 910, 913 (2d Cir. 1977); Burns v. Denver Post, Inc., 606 P.2d 1310, 1311 (Colo. App. 1980); National Association of Government Employees v. Central Broadcasting Corp., 396 N.E. 996, 1002 (Mass. 1979); Chalpin v. Amordian Press, 12 Media L. Rep. 1422, 1424 (N.Y. Sup. Ct. 1985); New Deal Restaurant v. WPIX, 11 Media L. Rep. 1965,

ascertaining with any certainty the purposes that may lie behind an individual's actions, decisions in the third and ninth circuits as well as Colorado and Arizona indicate that accusations of improper motives must always be treated as statements of opinion.[47] California and New York follow the same rule for somewhat different reasons.[48]

1966 (N. Y. Sup. Ct. 1985).

[47] Janklow v. Newsweek, 12 Media L. Rep. at 1964 (governor allegedly motivated by personal animus toward criminal defendant); Pierce v. Capital Cities Communications, Inc., 576 F.2d 494, 503-04 (3d Cir. 1978) (mayor allegedly motivated by conflict of interest); MacConnell v. Mitten, 638 P.2d 689, 692 (Ariz. 1981) (reason employer dismissed plaintiff); Burns v. Denver Post Co., 606 P.2d 1310, 1311 (Ariz. 1980)("There is no way Burns' opinion as to his ex-wife's motivation in divorcing him can be proved true or false").

[48] Good Government Group of Seal Beach v. Superior Court, 586 P.2d 572, 576, 150 Cal. Rptr. 258 (1978)(attacks on the "subjective motives of competitors . . . are merely statements of opinion"); Rinaldi v. Holt, Rinehart, 42 N.Y.2d at

These widely varying standards have led to conflicting decisions regarding the constitutional status of particular statements. An accusation of criminal conduct may be a constitutionally protected expression of opinion in Florida and the sixth and ninth circuits,[49] but it is always actionable in New York and the second and eighth circuits.[50] Calling someone a liar is an opinion in Missouri and California,[51] but an assertion of fact

---

382 ("inquiry into motivation is within the scope of absolute privilege").

49 Hay v. Independent Newspapers, 450 So.2d 293 (Fla. App. 2 Dist. 1984); Lewis v. Time, Inc., 710 F.2d 549 (9th Cir. 1983); Orr v. Argus-Press Co., 586 F.2d 1108 (6th Cir. 1978).

50 Silsdorf v. Levine, 59 N.Y.2d 8 (1983); Cianci v. New Times Publishing Co., 639 F.2d 54, 63-64 (2d Cir. 1980); Lauderback v. American Broadcasting Companies, 741 F.2d 193, 197 (8th Cir. 1984).

51 Iverson v. Crow, 639 S.W.2d 118, 119-20 (Mo. App. 1982); Block v. Desert Sun, 6 Media L. Rep. 1367, 1368 (Cal. App. 1980).

in Illinois and Ohio.[52] The second circuit holds that calling someone a "liar" is an expression of opinion, but that calling the same person a "paid liar" is a factual statement.[53] An accusation that an individual is "dishonest" is a factual assertion in Texas,[54] but six other states as well as four circuits treat as constitutionally protected opinion assertions that an individual is "unscrupulous", "shady," "sleazy", or "unethical", or has engaged in "fraud", "deceit", or a "ripoff".[55] The

---

52 Costello v. Capital Cities Media, 9 Media L. Rep. 1434, 1436-37 (Ill. App. 1982); Milkovich v. News Herald, 473 N.E.2d 1191, 15 Ohio St. 3d 292 (1984).

53 Edwards v. National Audubon Society, 556 F.2d 113, 121-22 (2d Cir. 1977).

54 First Bank of Corpus Christi v. Ake, 606 S.W.2d 696, 700 (Tex. Civ. App. 1980).

55 Church of Scientology v. Cazares, 638 F.2d 1272, 1289 (5th Cir. 1981) ("ripoff"); Orr v. Argus-Press Co., 586 F.2d at 1110 ("fraud", "swindle"); Lauderback v. American Broadcasting Companies, 741 F.2d

constitution protects criticism of the competence of a worker or employee in West Virginia, Maine, and the seventh circuit,[56] but not in Oregon, Louisiana, or the second circuit.[57] Calling a television

---

at 195 ("rotten," "unethical"); Lewis v. Time Incorporated, 710 F.2d 549, 551 (9th Cir. 1983) ("shady"); Okun v. Superior Court, 29 Cal.3d 442, 451, 175 Cal. Rptr. 157, 629 P.2d 1369 ((1981)("wheeler-dealer"); Stones River Motors, Inc. v. Mid-South Pub. Co., 651 S.W.2d 713, 718 (Tenn. App. 1983) ("rip-off"); Foote v. Sarafyan, 432 So.2d 877, 879-809 (La. App. 4 Cir. 1982) ("fraud"; "deceit"); Anton v. St. Louis Suburan Newspapers, 598 S.W.2d 493, 495 (Mo. App. 1980) ("sleazy"); Henry v. Halliburton, 690 S.W.2d 775, 789 (Mo. banc 1985) ("fraud"); Chalpin v. Amordian Press, 12 Media L. Rep. 1422 (N.Y. Sup. Ct. 1985) ("unbelievably unscrupulous").

[56] Miller v. Charleston Gazette, 9 Media L. Rep. 2540, 2545 (Cir. Ct. W. Va. 1983) ("second-rater"); Caron v. Bangor Publishing Co., 470 A.2d 782, 783 (Me. 1984) (police officer not "effective"); Spelson v. CBS, 11 Media L. Rep. 1900, 1901 (7th Cir. 1985) (chiropracter a "medical quac[k]").

[57] Bock v. Zittenfield, 66 Or. App. 97, 101, 672 P.2d 1237 (1983) (statement by former employer that "I wouldn't hire him as a supervisor"); McHale v. Lake Charles American Press, 6 Media L. Rep. 2478, 2487

journalist the "worst" sportscaster in Boston[58] is constitutionally protected in Massachusetts, but asserting that a print journalist is the "worst" writer at Sports Illustrated is unprotected and libelous in New York.[59]

The Virginia courts in the instant case did not merely misapply Gertz; they deliberately and repeatedly refused to apply Gertz at all. The 1982 trial court expressly declined to decide if the disputed advertisement was a constitutionally expression of opinion, and the Virginia Supreme Court refused in both

---

(La. App. 1980) (investment advisor competence such that no bond buyer would reply on his opinion); Davis v. Ross, 754 F.2d 80, 81 (2d Cir. 1985) (statement by former employer that she did "not recommend" plaintiff).

58 Myers v. Boston Magazine Co., Inc., 403 N.E.2d 376 (1980).

59 Maule v. N.Y.M. Corporation, 429 N.Y.S.2d 891, 76 A.D. 58 (1980).

1983 and 1986 even to consider that issue. (See 15-16, supra). The result in this case is clearly inconsistent with the rules in California, New York, Colorado, Arizona and the third and ninth circuits that statements about the motives of others are necessarily matters of opinion. The advertisement would doubtless be considered an opinion as well in at least some of the jurisdictions applying the various multi-part and Restatement standards. The Virginia courts, however, simply refused to address the central First Amendment issue at the heart of this litigation.

Far more is at stake here than a complex conflict among the lower courts regarding an important issue of constitutional law. The framers of the Fourteenth Amendment were determined to extend the restrictions of the First Amendment to the

states because, in the years after the Civil War, as had been true in the antebellum period, those who criticized the treatment of blacks were free to voice those objections in the north, but risked official retaliation or punishment if they made such remarks in southern states. J. tenBroek, Equal Under Law (1969). The decision in this case recreates precisely the type of problem with which Congressmen Bingham and other members of the thirty-ninth Congress were concerned. Had petitioner chosen to denounce respondent in another state, he would have faced no legal difficulties. Petitioner would have enjoyed absolute constitutional protection if he had called respondent a Nazi, a facist or a Stalinist in New York, a [60]

[60] New Testament Missionary Fellowship v. Dutton, 9 Media L. Rep. 1174, 1175 (N.Y. Sup. Ct. 1982) ("facist"); Holy Spirit Ass'n v. Sequoia Elsevier Publishing Co., 426 A.D.2d 759, 760 (1980) ("Nazi-style

Marxist in the District of Columbia,[61] a hood or a thug in Michigan,[62] the scum of the earth in New Hampshire,[63] or a sadist, a nut, a barbarian, a lunkhead or a meatball in Massachusetts.[64] But when petitioner chose instead to assert in Virginia that respondent had taken a single action that was racially motivated, petitioner became liable for an enormous punitive award exacted under color of state law. The injustice of that result is exacerbated by the fact that, in 1984,

---

anti-Semitism"); Brower v. New Republic Inc., 7 Media L. Rep. 1605 (N.Y. Sup. Ct. 1981) ("old Stalinist").

61 Ollman v. Evans, supra.

62 Lins v. Evening News, 9 Media L. Rep. 2380 (Mich. Ct. App. 1983).

63 Pease v. Telegraph Publishing Co., 426 A.2d 463 (N.H. 1981).

64 Fleming v. Benzaquin, 454 N.E.2d 95, 100 (Mass. 1983); Medeiros v. Northeast Publishing, 8 Media L. Rep. 2500 (Mass. Super. Ct. 1982).

the same year that the Supreme Court of Virginia refused even to consider petitioner's contention that an allegation of "racism" is constitutionally protected, the Supreme Court of North Carolina held that the laws of that state did not permit a black man to sue for libel because he had been publicly accused of "reverse racism."[65]

The implications of the decision below are particularly grave because, in sustaining an award of punitive damages, the Virginia Supreme Court held that the existence of malice had been proved by the fact that petitioner made the statement in

---

[65] Renwick v. News Observer Publishing Co., 312 S.E.2d 405, 407 (N.C. 1984). The newspaper editorial at issue also denounced Renwick as an "extremist", and suggested that he had lied about the operations of the minority admissions program he had supervised at the University of North Carolina; neither of these assertions was held actionable.

question in the absence of any "objective" proof of racism. (App.102). As this Court itself has noted, such direct evidence of discrimination is only rarely present in discrimination cases. U.S. Postal Service v. Aikens, 460 U.S. 71, 76 (1983). Thus under the decision in this case, almost any allegation of racism in Virginia will be deemed malicious as a matter of law, a holding that not only permits an award of punitive damages, but allows a successful libel action on behalf of a public official. In Virginia today any citizen or civil rights organization that criticizes a judge, legislator or other public figure as biased runs a serious risk of being mulct in damages by a hostile all-white jury.

II. The Award of $233,333 Is So Excessive as to Violate the First Amendment

Twelve years ago this Court warned that, because of the lack of any legal standards governing libel awards, juries "remain free to use their discretion selectively to punish expressions of unpopular views." Gertz v. Welch, 418 U.S. at 350. In light of that danger, the majority in Gertz concluded that there were constitutional limitations on the amount of compensatory and punitive damages that might be awarded in a libel case. 418 U.S. at 349-50. Justice White urged that "immoderate verdicts" should be corrected under "the salutary New York Times policy of case-by-case 'independent examination of the whole record'". 418 U.S. at 397-98.

In the instant case the largest officially reported libel verdict in Virginia history has been imposed by a jury upon a defendant who dared to voice a view that for centuries has been of unique unpopularity in that region. No one could seriously suggest that this has occurred by coincidence. For generations many whites have reacted with anger, outrage and even violence to blacks who complained about racial injustices. The $233,333 judgment in this case, imposed for the expression of just such a grievance, is five times larger than any libel judgment ever previously upheld by the Virginia Supreme Court.[66] The second highest such judgment, a verdict of $55,000 per plaintiff against a union for calling a

---

[66] A list of all libel verdicts appealed to that court since 1925 is set out in Table B, reproduced at the end of this petition.

strike breaker a "scab,"[67] was overturned by this Court. Letter Carriers v. Austin, 418 U.S. 264 (1974).

The excessive and extraordinary nature of the verdict in this case is particularly apparent with regard to the award of punitive damages, including interest, The 1982 jury awarded punitive damages, including interest, of $491,000, and the remittitur in this case effectively reduced the punitive award to $166,660. The largest punitive award ever previously upheld by the Virginia Supreme Court, excepting the decision in Letter Carriers, was only $999.[68] The $166,666 private fine imposed in this case for the

---

[67] National Association of Letter Carriers v. Austin, 213 Va. 377 (1972).

[68] Wright v. Corfield, 146 Va. 637 (1926). The punitive award in Letter Carriers was $45,000 for each of the three plaintiffs there.

express purpose of punishing petitioner is far higher than the fines authorized by the Virginia Criminal Code for even serious criminal conduct. Under Virginia law, the maximum fine for assault, grand larceny or voluntary manslaughter is $1,000;[69] but state law places no limit whatever on the monetary sanction that can be imposed for injuring a man's "honor." In Virginia as elsewhere convicted felons and misdemeanants are regularly sentenced only to fines far smaller than the $166,666 imposed on petitioner.

The majority in Gertz expressed the hope that the danger of excessive compensatory awards would be reduced because jury discretion would "be limited by appropriate instructions". 418 U.S. at 350. But in the instant case the instruc-

---

[69] Code Va. §§ 18.2-10, 18.2-35, 18.2-51, 18.2-59, 18.2-93.

tions on damages merely listed the types of psychic injuries that could be redressed, without any guidance regarding how compensation was to be measured. (Tr. 576). The result was predictably arbitrary. The jury which heard this case in 1978 concluded that the injuries sustained by respondent had a value of $10,000; four years later the second jury, on virtually the same record, fixed the amount of those very same injuries at $100,000. The ultimate damage award of $66,666 for being called a racist is several times larger than the average libel verdict sustained by the Virginia Supreme Court in cases in which the plaintiff was falsely accused of commiting a criminal offense.[70]

---

[70] See Table B, infra.

Just as it was important in past cases to delineate whether an award of as little as $5,000 was based on a constitutionally sound finding of liability, St. Amant v. Thompson, 390 U.S. 727, 729 (1968), so too is it critical to determine whether even such a finding can support a $266,666 judgment in favor of a libel plaintiff who admittedly suffered not one dollar of financial injury. Any damage award in a libel case carries with it a risk of chilling freedom of speech, but judicial approval of crushing awards such as that in this case is likely to have a far greater deterrent effect. Certiorari should be granted to overturn the verdict below, and to establish for the fixing and review of future verdicts constitutional standards that will prevent the sort of abuse that occurred here.

III. Certiorari Should Be Granted to Decide Whether Batson v. Kentucky Applies to Civil Litigation Regarding Racial Issues.

At the outset of the 1982 trial in this case, after counsel for respondent used his peremptory challenges to remove all blacks from the jury, petitioner unsuccessfully moved to quash the resulting jury panel on the grounds that it was constituted in an unconstitutional manner. (App. 147-51). When petitioner urged the Virginia Supreme Court to review that issue, counsel for respondent argued that his action was expressly sanctioned by Swain v. Alabama, 380 U.S. 202 (1965).[71] On

[71] Brief in Opposition to Petition to Appeal, No. 83-1446, pp. 39-41. ("[T]he Supreme Court of the United States has categorically rejected this argument. Swain v. Alabama . . . . Fleming . . . submits that the trial judge should examine 'the core of the case' in order to decide whether it is necessary to assure that a black . . . be included . . . . Such an exception to the Swain ruling would place

January 7, 1984, the Virginia Supreme Court declined to consider this issue, and on March 7, 1986, that court finally denied rehearing in this case. Less than two months later this Court overruled Swain. Batson v. Kentucky, No. 84-6263 (April 30, 1986).

The question presented by this case is whether Batson should be applied to civil litigation involving sensitive racial issues. Batson itself did not squarely resolve that issue. See 90 L.Ed.2d at 82 n. 12. Although respondent's attorney was not himself a state employee, the actual order that all black veniremen stand aside was issued in this case by a state judge acting under color

---

exception to the Swain ruling would place entirely too much discretion in the trial judge").

of law at the behest of respondent. See Shelley v. Kramer, 334 U.S. 1 (1948). Several lower court cases addressing this issue have concluded that the constitutional restrictions on a prosecutor's use of peremptory challenges would apply in at least some cases to the use of such challenges by a private litigant.[72]

The constitutional restrictions against racial discrimination in jury selection apply to private civil litiga-

---

[72] Booker v. Jabe, 775 F.2d 762,771-72 (6th Cir. 1985) (criminal defense counsel subject to constitutional limitations); McCray v. Abrams, 581 F. Supp. 493, 499 (E.D.N.Y. 1984) (rules regarding use of peremptories in civil case substantially the same as in criminal case); Miami v. Cornett, ___ So.2d ___ (No. 81-85, Fla. D. Ct. App.) (slip opinion Jan. 29, 1985) (in racially sensitive civil case "[t]he misuse of the peremptory challenges to eliminate identifiable groups contributes to an undermining of the integrity of the justice system"; it is "the responsibility of the court to minimize that potential for abuse by imposing some reasonable limitations on the exercise of the challenge").

tion as well as to criminal cases. Thiel v. Southern Pacific Co., 328 U.S. 217 (1946). Much of the reasoning of Batson is entirely applicable to the instant case. Batson warned that "[b]y compromising the representative quality of the jury, discriminatory selection procedures make 'juries ready weapons . . . to oppress those . . . individuals who . . . are numbered among unpopular . . . minorities'". Id at 81 n. 8. These dangers were relatively mild in Batson itself, where the only racial element in the case stemmed from the race of the defendant. In the instant case that danger is far greater, not only because the opposing litigants are of different races, but because the subject matter of the litigation is one of extraordinary racial sensitivity.

A decision sustaining petitioner's objections to the jury selection procedure in this case need not extend Batson to every civil case. We ask only that the Court hold, as it did in Turner v. Murray, 90 L.Ed.2d 27 (1985), that the specific racial circumstances of this case require particular procedural safeguards. In this case, as in Hamm v. South Carolina, 409 U.S. 524 (1973), "racial issues 'were inextricably bound up with the conduct of the trial.'" Turner v. Murray, 90 L.Ed.2d at 45 (Powell, J., dissenting). In assessing the accuracy and reasonableness of petitioner's allegation of racism, white jurors would necessarily bring to their deliberations experiences and sensitivities totally different than would blacks. Although Virginia statutes provided some standards to guide the sentencing jury in Turner, the jury in

this case had virtually no such guidance in fixing the amount of compensatory damages, and none whatsoever in determining the amount of punitive damages. Thus here, as in Turner, "the range of discretion entrusted to a jury . . . [provides] a unique opportunity for racial prejudice to operate but remain undetected." 90 L.Ed.2d at 35. The Virginia Supreme Court in this case candidly acknowledged that the excessiveness of the 1982 verdict"on its face indicates prejudice or partiality". (App. 105).

IV. The Decision Below Is Inconsistent With Bose Corp. v. Consumers Union, 80 L.Ed.2d 502 (1984).

In Bose Corp. v. Consumers Union, 80 L.Ed.2d 502 (1984), this Court held that "in cases raising First Amendment issues . . . an appellate court has an obligation to 'make an independent

examination of the whole record' in order to make sure 'that the judgment does not constitute a forbidden intrusion on the field of free expression.' " 80 L.Ed.2d at 515. In the instant case there has never been any appellate review at all of many of the constitutional issues. Among the questions which the Virginia Supreme Court simply refused to decide in 1984 and 1986 were whether petitioner's statement was an absolutely privileged expression of opinion under the First Amendment, whether respondent was a public figure, whether the 1982 jury was constituted in a manner that violated the Fifth and Fourteenth Amendments, and whether the $233,333 judgment was unconstituionally excessive.[73]

[73] App. 50-53, 127-28, 263-72, 277-78.

We believe that Bose requires a state court with appellate jurisdiction over a libel case to exercise that jurisdiction and squarely resolve the federal constitutional questions raised. At the least, Bose requires this Court to scrutinize with particular care petitions in libel cases seeking review of First and Fourteenth Amendment issues which the state appellate courts simply refused to consider or resolve.

The record in this case falls far short of Bose's insistence that a libel plaintiff establish by "clear and convincing evidence" that he has met the substantive constitutional requirements of New York Times v. Sullivan and its progeny. 80 L.Ed.2d at 523, 525. Respondent was understandably regarded both by local officials and by his own attorney as one of the principal leaders of the

opposition to the disputed development that was the subject of a raging public debate in Albemarle County. Respondent spoke at some public meetings, engaged an attorney to speak at others, met with both county officials and the developers, and helped to instigate the litigation that ultimately led to the project's demise. Having chosen to play a central role in a controversy as heated and important as any political campaign or labor dispute, respondent was surely a limited purpose public figure who had "thrust [him]self to the forefront of [a] public controversy in order to influence the resolution of the issues involved in it". Time, Inc. v. Firestone, 424 U.S. 448, 453 (1976).

The record in this case is clearly insufficient to establish that petitioner's statement was made with malice. Not even the Virginia Supreme Court

suggested that petitioner knew or could have known that his statement was false; only respondent will ever know with certainty what motive prompted him to campaign against the proposed development. The Virginia Supreme Court did not find that recklessness had been shown by "clear and convincing evidence", but utilized a less stringent standard, holding only that the evidence was "substantial" and "credible." (App.101). The state appellate court reasoned that the record showed a reckless disregard for truth since petitioner lacked "objective" evidence that respondent was racially motivated; as we explained earlier, that analysis was erroneous as a matter of law. This Court recognized in New York Times v. Sullivan, that "[e]rrors of fact, particularly in regard to a man's mental states and processes, are inevitable." 376 U.S. at

272. If petitioner misconstrued respondent's intentions, his error was precisely "the sort of inaccuracy that is commonplace in the forum of robust debate to which the New York Times rule applies." Bose Corp. v. Consumers Union, 80 L.Ed.2d at 525.

CONCLUSION

For the above reasons a writ of certiorari should be issued to review the judgments and opinions of the Virginia Supreme Court.[74]

Respectfully submitted,

D. ALAN RUDLIN
W. JEFFREY EDWARDS
Hunton & Williams
P.O. Box 1535
Richmond, VA 23212
(804) 788-8200

---

[74] See, n. 1, supra.

J. BENJAMIN DICK
Suite 2
421 Park Street
Charlottsville,
VA 22901

SAMUEL W. TUCKER
Hill, Tucker & Marsh
P.O. Box 27363
Richmond, VA 23261

GERALD E. POINDEXTER
Surry Courthouse Square
Surry, VA

J.LeVONNE CHAMBERS
ERIC SCHNAPPER *
NAACP Legal Defense
& Educational Fund,
Inc.
16th Floor
New York, New York 10013

Attorneys for Petitioner

*Counsel of Record

TABLE A

Lower Court Opinioms Regarding Constitutionally Protected Expressions of Opinion 1974 - 1988

I. Federal Courts of Appeals

(1) District of Columbia Circuit

Ollman v. Evans, 713 F.2d 838 (D.C. Cir. 1983) (panel opinion), 750 F.2d 970 (D.C. Cir. 1984)(em banc)

McBride v. Merrell Dow & Pharmaceuticals, Inc., 717 F.2d 1460, 1464, n.7 (D.D. Cir. 1983)

(2) First Circuit

Bose Corp. v. Consumers Union, Inc., 692 F.2d 189, 192-94 (1st Cir. 1982)

(3) Second Circuit

Mr. Chow of New York v. Ste. Jour Azur, S.A., 759 F.2d 219, 223-27 (2d Cir. 1985)

Davis v. Ross, 754 F.2d 80, 85-88 (2d Cir. 1985)
Cianci v. New Times Publishing Co., 639 F.2d 54, 61-64 (2d Cir. 1980)
Edwards v. National Audubon Society, Inc., 556 F.2d 113, 121 (2d Cir. 1977)
Hotchner v. Castillo-Puche, 551 F.2d 910, 912-13 (2d Cir. 1977)
Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976)

(4) Third Circuit

Redco Corp. v. CBS, 11 Media L. Rep. 1861 (3d Cir. 1985)
Avins v. White, 627 F.2d 637, 642 (3d Cir. 1980)
Pierce v. Capital Cities Communications, 576 F.2d 495, 503 (3d Cir. 1978)

(5) Fourth Circuit

National Foundation for Cancer Research, Inc. v. Council of Better Business Bureau, Inc., 705 F.2d 98, 100-01 (4th Cir. 1983)

(6) Fifth Circuit

Wyatt v. Kaplan, 686 F.2d 276, 278, 282(5th Cir. 1983)
Church of Scientology v. Cazares, 638 F.2d 1272, 1286-89 (5th Cir. 1981)

(7) Sixth Circuit

Schultz v. Newsweek, 668 F.2d 911, 913-18 (6th Cir. 1982)
Street v. NBC, 645 F.2d 1227, 1233 (6th Cir. 1981)
Orr v. The Argus Press Co., 586 F.2d 1108, 1114-15 (6th Cir. 1978)

(8) Seventh Circuit

Action Repair v. ABC, 12 Media L. Rep. 1398 (7th Cir. 1985)
Spelson v. CBS, 11 Media L. Rep. 1900 (7th Cir. 1985)

(9) Eighth Circuit

Janklow v. Newsweek, Inc., 759 F.2d 644 (8th Cir. 1985) (panel opinion), 12 Media L. Rep. 1961 (8th Cir. 1986)(en banc)

Lauderback v. American Broadcasting Co. Inc., 741 F.2d 193 (8th Cir. 1984)

(10) Ninth Circuit

Kaplan v. Newsweek, 12 Media L. Rep. 1277 (9th Cir. 1985)

Lewis v. Time, Inc., 710 F.2d 549, 552-54 (9th Cir. 1983)

Information Control Corp. v. Genesis One Computer Corp., 611 F.2d 781 (9th Cir. 1980)

(11) Tenth Citcuit

Rinsley v. Brandt, 700 F.2d 1304, 1307 (10th Cir. 1983)

Dixon v. Newsweek, Inc., 562 F.2d 626, 631 (10th Cir. 1977)

(12) Eleventh Circuit

Keller v. Miami Herald Publishing Co., 778 F.2d 711, 715-17 (11th Cir. 1985)

Hallmark Builders v. Gaylord Broadcasting, 10 Media L. Rep. 1981 (11th Cir. 1984)

II. Federal District Court Opinions

Trump v. Chicago Tribune Co., 12 Media L. Rep. 1060 (S.D.N.Y. 1985)

Korkala v. W.W. Norton, 12 Media L. Rep. 1271 (S.D.N.Y. 1985)

Kelly v. Schmidberger, 12 Media L. Rep. 1297 (S.D. N.Y. 1985)

Koch v. Goldway, 607 F. Supp. 1178 (S.D.N.Y. 1984)

Herbert v.Lando, 596 F. Supp. 1178 (S.D.N.Y. 1984)

Westmoreland v. CBS, 596 F. Supp. 170 (S.D.N.Y. 1984)

Conniff v. Dodd Mead, 593 F. Supp. 266 (S.D.N.Y. 1984)

Dowd v. Calabrese, 589 F. Supp. 1206 (D.D.C. 1984)

Smith v. McMullen, 589 F. Supp. 642 (S.D. Tex. 1984)

Held v. Pokorny, 583 F. Supp. 1038 (S.D.N.Y. 1984)

Spelson v. CBS, 581 F. Supp. 1195 (N.D. Ill. 1984)

Auvil v.Times Journal Company, 10 Media L. Rep. 2302 (E.D. Va. 1984)

Redco Corp. v. CBS, 10 Media L. Rep. 1536 (M.D. Pa. 1984)

Ricci v. Venture Magazine, 574 F.Supp. 1563 (D. Mass. 1983)

Grass v. News Group Publications, 570 F.Supp. 178 (S.D.N.Y. 1983)

Cinker, Inc. v. Northern Gas Co., 578 F.Supp. 112, 114-15 (D. Wyo. 1983)

National Rifle Association v. Dayton Newspapers, Inc., 555 F.Supp. 1299, 1304-05 (S.D. Ohio 1983)

Adler v. American Standard Corp., 538 F.Supp. 572, 576 (D. Md. 1982)

Wynberg v. National Enquirer, 8 Media L. Rep. 2398 (C.D. Cal. 1982)

Cibenko v. Worth Publishers, 510 F.Supp. 761, 765 (D.N.J. 1981)

McManus v. Doubleday, 513 F.Supp. 1383 (S.D.N.Y. 1981)

Loeb v. New Times Communications Corp., 497 F.Supp. 85 (S.D.N.Y. 1980)

Loeb v. Globe Newspaper Co., 489 F.Supp. 481 (D. Mass. 1980)

Yerkie v. Post Newsweek Stations, Michigan, Inc., 470 F.Supp. 91, 94 (D.Md. 1979)

Steaks Unlimited, Inc. v. Deaner, 468 F.Supp. 779 (W.D. Pa. 1979)

Stripling v. Literary Guild of America, 5 Media L. Rep. 1958 (W.D. Tex. 1979)

Church of Scientology v. Siegelman, 5 Media L. Rep. 2021 (S.D.N.Y. 1979)
Hoover v. Peerless Publications, Inc., 461 F.Supp. 1206, 1209-10 (E.D. Pa. 1978)
Hillman v. Metromedia, Inc., 452 F.Supp. 727 (D. Md. 1978)
Guitar v. Westinghouse Electric Corp., 396 F.Supp. 1042, 1048 (S.D.N.Y. 1975)

III. State Court Decisions

(1) Arizona

MacConnell v. Mitten, 131 Ariz. 22, 638 P.2d 689, 692 (1981)
Phoenix Newspapers, Inc. v. Church, 24 Ariz. App. 287, 537 P.2d 1345 (1975)

(2) California

Underwood v. CBS, Inc., 150 Cal. App.2d 460, 198 Cal. Rpt. 48, 52, 53 (Cal. App. 1984)
Walker v. Chronicle Publishing Co., 10 Media L. Rep. 1282 (Cal. App. 1984)

B & B Group v. Los Angeles Herald Examiner, 10 Media L. Rep. 1892 (Cal. App. 1984)

Belli v. Barryhill, 11 Media L. Rep. 1221 (Cal. App. 1984)

Okun v. Superior Court, 29 Cal.3d 442, 175 Cal. Rptr. 157 (1981)

Rollenhagen v. Orange, 116 Cal. App.3d 414 (Cal. App. 1980)

Institute of Athletic Motivation v. University of Illinois, 114 Cal. App.3d 1, 170 Cal. Rptr. 411 (Cal. App. 1980)

Desert Sun Publishing Co. v. Superior Court, 97 Cal. App.3d 49, 158 Cal. Rptr. 519 (Cal. App. 1979)

Blackhawk Corp. v. Ewing, 94 Cal. App.3d 640, 156 Cal. Rptr. 581 (Cal. App. 1979)

Good Government Group of Seal Beach v. Hogard, 22 Cal.3d 372, 586 P.2d 572, 152 Cal. Rptr. 258 (1978)

Sierra Breeze v. Superior Court, 86 Cal. App.3d 102 (Cal. App. 1978)

Gregory v. McDonnell Douglas Corp., 17 Cal.3d 596, 131 Cal. Rptr. 641, 552 P.2d 425 (1976)

Scott v. McDonnell Douglas Corp., 37 Cal. App.3d 277, 112 Cal. Rptr. 609 (Cal. App. 1974)

(3) Colorado

Russell v. McMillen, 685 P.2d 255 (Colo. Ct. App. 1984)
Lane v. Arkansas Valley Pub. Co., 675 P.2d 747, 750, 751 (Colo. App. 1983)
Dorr v. C.B. Johnson, Inc., 660 P.2d 517, 520 (Colo. App. 1983)
Burns v. McGraw-Hill Broadcasting Co., 659 P.2d 1351, 1357 (Colo. 1983)
Burns v. Denver Post, Inc., 606 P.2d 1310, 1311, 43 Colo. App. 325 (Colo. App. 1979)
Bucher v. Roberts, 198 Colo. 1, 3, 595 P.2d 239, 241 (1979)

(4) Connecticut

Strada v. Connecticut Newspapers, 193 Conn. 313, 477 A.2d 1005, 1011 n.12 (1984)
Goodrich v. Waterbury Republican-American, 188 Conn. 107, 448 A.2d 1317, 1231-24 (1982)

(5) Delaware

Slawik v. News-Journal Co., 428 A.2d 15, 16-17 (Del. 1981)

(6) Florida

Hay v. Independent Newspapers, 450 So.2d 293 (Fla. Dist. Ct. App. 1984)

Sepmeier v. Tallahassee Democrat, 10 Media L. Rep. 1285 (Fla. Cir. Ct. App. 1984)

Victor v. News and Sun Sentinel Co., 10 Media L. Rep. 2073 (Fla. Cir. Ct. 1984)

Smith v. Taylor County Pub. Co. Inc., 443 So.2d 1042, 1047 (Fla. App. 1983)

Eastern Airlines, Inc. v. Gellert, 438 So.2d 923, 927 (Fla. App. 1983)

Shiver v.Apalachee Publishing Co., 425 So.2d 1173 (Fla. Dist. Ct. App. 1983)

De Moya v. Walsh, 9 Media L. Rep. 2527 (Fla. Dist. Ct. App. 1983)

Rudesyle v. Coll, 8 Media L. Rep. 1751 (Fla. Cir. Ct. 1982)

From v. Tallahassee Democrat, Inc., 400 So.2d 52 (Fla. Dist. Ct. App. 1981)

Wade v. Stocks, 7 Media L. Rep. 2200 (Fla. Cir. Ct. 1981)
Lampkin-Asam v. Miami Daily News, 6 Media L. Rep. 2086 (Fla. Cir. Ct. 1980)
Coleman v. Collins, 384 So.2d 229, 231 (Fla. Dist. Ct. App. 1980)
Ihl v. Florida Publishing Co., 5 Media L. Rep. 2005 (Fla. Cir. Ct. 1979)
Craig v. Moore, 4 Media L. Rep. 1402 (Fla. Cir. Ct. 1978)
Palm Beach Newspapers v. Early, 334 So.2d 50 (Fla. Dist. Ct. App. 1976)

(7) Georgia

Whitfield v. Southern Newspapers, 10 Media L. Rep. 1771, 1773-74 (Ga. Super. Ct. 1984)
Brooks v. Stone, 9 Media L. Rep. 1823 (Ga. Cty. Ct. 1983)
Walker v. Southeastern Newspapers, 9 Media L. Rep. 1516 (Ga. Cty. Ct. 1982)

(8) Illinois

Costello v. Capital Cities Media, 9 Media L. Rep. 1434 (Ill. Ct. App. 1982)
Catalano v. Pechous, 60 Ill. App.3d 797, 387 N.E.2d 714, 723-24 (1979)

(9) Indiana

Wefler v. Indianapolis Newspapers, 7 Media L. Rep. 1876 (Ind. Cir. Ct. 1981)

(10) Kentucky

Haynes v. McConnell, 642 S.W.2d 902, 904 (Ky. 1982)

(11) Louisiana

Foote v. Sarafyan, 432 So.2d 877, 879, 881 (La. App. 1983)
McHale v. Lake Charles American Press, 6 Media L. Rep. 2478, 2486-87 (La. App. 1980)
Economy Carpets Manufacturers v. Better Business Bureau, 361 So.2d 234 (La. App. 1978)
Mashburn v. Collin, 355 So.2d 879, 885 (La. 1977)

(12) Maine

Caron v. Bangor Publishing Co., 470 A.2d 782, 784 (Me. 1984)

13) Maryland

Hearst Corp. v. Hughes, 297 Md. 112, 466 A.2d 486, 496 (1983)
Kapiloff v. Dunn, 27 Md. App. 514, 343 A.2d 251 (175)

(14) Massachusetts

Fleming v. Benzaquin, 390 Mass. 175, 454 N.E.2d 95, 100-04 (1983)
Pristker v. Brudnoy, 389 Mass. 776, 452 N.E.2d 227, 228-29 (1983)
Cole v. Westinghouse Broadcasting Co., 386 Mass. 303, 435 N.E.2d 1021 (1982)
Myers v. Boston Magazine Co., 380 Mass. 336, 403 N.E.2d 376, 380-81 (1980)
National Association of Government Employees v. Central Broadcasting Corp., 396 N.E.2d 996 (1979)

15) Michigan

Lins v. Evening News, 9 Media L. Rep. 2380 (Mich. Ct. App. 1983)
Searer v. Wometco West Michigan TV, 7 Media L. Rep. 1639 (Mich. Cir. Ct. 1981)

(16) Mississippi

Ferguson v. Watkins, 448 So. 2d 271, 276 (Miss. 1984)

(17) Missouri

Henry v. Hallirburton, 690 S.W.2d 775 (Mo. 1985)
Buller v. Pulitzer Publishing, 684 S.W.2d 472 (Mo. Ct. App. 1984
Iverson v. Crow, 639 S.W.2d 118, 119 (Mo. 1982)
Anton v. St.Louis Suburban Newspapers, 598 S.W.2d 493, 499 (Mo. Ct. App. 1980)

(18) Nevada

Nevada Independent Broadcasting v. Allen, 664 P 2d 337, 342 (Nev. 1983)

(19) New Hampshire

Nash v. Keene Publishing Corp., 12 Media L. Rep. 1025 (N.H. 1985)
Pease v. Telegraph Publishing Co., 426 A.2d 463 (N.H. 1981)

(20) New Jersey

Kotlikoff v. The Community News, 89 N.J. 62, 69, 444 A.2d 1086, 1091 (1982)

(21) New Mexico

Marchiondo v. Brown, 98 N.M. 394, 649 P.2d 462 (1982)

Kutz v. Independent Publishing Co., 97 N.M. 243, 638 P.2d 1088 (1981)

(22) New York

Chalpin v. Amordian Press, 12 Media L. Rep. 1422 (N.Y. Sup. Ct. 1985)
Katz v. Newsday, 11 Media L. Rep. 2456 (N.Y. Sup. Ct. 1985)
Lucille Farm Products v. Dow Jones, 11 Media L. Rep. 2240 (N.Y. Sup. Ct. 1985)

New Deal Restaurant v.WPIX, 11 Media L. Rep. 1965 (N.Y. Sup. Ct. 1985)

Hellman v. McCarthy, 10 Media L. Rep. 1789 (N.Y. Sup. Ct. 1985)

Silsdorf v.Levine, 85 A.D. 297, 447 N.Y.S.2d 936, 941 (1981)

Ritter v. Matthes, 9 Media L. Rep. 1744 (N.Y. Sup. Ct. 1983)

Golden v. Elmira Star Gazette, 9 Media L. Rep. 1183 (N.Y. Sup. Ct. 1983)

New Testament Missionary Fellowship v. Dutton, 9 Media L. Rep. 1174 (N.Y. Sup. Ct. 1982)

Hentel v Knopf, 8 Media L. Rep. 1908 (N.Y. Sup. Ct. 1982)

DeLuca v. New York News, 109 Misc.2d 391, 438 N.Y.S.2d 199 (N.Y. Sup. Ct. 1981)

Gewurz v. Bernstein, 107 Misc.2d 857, 436 N.Y.S.2d 142 (N.Y. Sup. Ct. 1981)

Brower v. New Republic, Inc., 7 Media L. Rep. 1605 (N.Y. Sup. Ct. 1981)

Brady v. Ottaway Newspapers, 445 N.Y.S.2d 786 (App. Div. 1981)

Labor Party v. Anti-Defamation League, 6 Media L. Rep. 2209 (N.Y. Sup. Ct. 1980)

Ithaca College v. Yale Daily News, 433 N.Y.S.2d 530 (N.Y. Sup. Ct. 1980)
Wehringer v. Newman, 60 S.D. 2d 385, 400 N.Y.S.2d 533, 536-37 (1978)
Rank v. New York Times Co., 4 Media L. Rep. 1556 (N.Y. Sup. Ct. 1978)
Rinaldi v. Holt, Rinehart, 42 N.Y.2d 369, 380-81 (1977)

(23) North Carolina

Renwick v. News and Observer Pub. Co., 63 N.C. App. 200, 304 S.E.2d 593, 602, 612 (Ct. App. 1983)
Brown v. Boney, 41 N.C. App. 636, 648, 255 S.E.2d 784, 791 (Ct. App. 1979)

(24) Ohio

Milkovich v. News Herald, 473 N.E.2d 1191, 1196 (Ohio 1984)
Plough v. Schneider, 8 Media L. Rep. 1620 (Ohio Ct. App. 1982)
Greer v. Columbus Monthly, 8 Media L. Rep. 2129 (Ohio Ct. App. 1982)

Ferguson v. Dayton Newspapers, 7 Media L. Rep. 1396, 1398 (Ohio Com. Pleas 1981)

Dupler v. Mansfield Journal, 5 Media L. Rep. 2269 (Ohio C.t App. 1979)

(25) Oklahoma

McCullough v. Cities Service Co., 676 P.2d 833 (Okla. 1984)

Miskovsky v. Oklahoma Publishing, 654 P.2d 587 (Okla. 1982)

(26) Oregon

Bock v. Zittenfield, 66 Or. App. 97, 672 P.2d 237 (1983)

Haas v. Painter, 9 Media L. Rep. 1665 (Ore. Ct. App. 1983)

Cushman v. L. B. Day, 43 Or. App. 123, 602 P.2d 327 (1979)

Walsh v. Consolidated Freightways, 278 Or. 347, 563 P.2d 1205 (1977)

King v. Menolascino, 276 Or. 501, 555 P.2d 442 (1976)

(27) Pennsylvania

Braig v. Field Communications, 310 P. Super. 569, 456 A.2d 1366, 1372-73 (Pa. Super. 1983)
Beckman v. Dunn, 276 Pa. Super. 527, 419 A.2d 583, 587 (Pa. Super. 1980)

(28) Rhode Island

Hawkins v. Oden, 459 A.2d 481, 484 (R. I. 1983)

(29) Tennessee

Leader v. WSM, Inc., 10 Media L. Rep. 1343 (Tenn. Cir. Ct. 1984)
Windsor v. Tennesseean, 654 S.W.2d 680, 685 (Tenn. App. 1983)
Stones River Motors, Inc. v. Mid-South Publishing Co., 651 S.W.2d 713, 720-23 (Tenn. App. 1983)

(30) Texas

A.H. Belo Corp. v. Rayzor, 644 S.W.2d 71, 80 (Tex. App. 1982)
First State Bank v. Ake, 606 S.W.2d 696 (Tex. Civ. App. 1980)

(31) Virginia

Chaves v. Johnson, 230 Va. ___, 2 V.L.R. 216 (1985)
Motsinger v. Kelley, 11 Media L. Rep. 2459 (Va. Cir. Ct. 1985)

(32) Washington

Benjamin v. Cowles Publishing, 10 Media L. Rep. 1970 (Wash. Ct. App. 1984)
Senear v. Daily Journal American, 8 Media L. Rep. 2489 (Wash. Super. Ct. 1982)

(33) West Virginia

Miller v. Charleston Gazette, 9 Media L. Rep. 2540 (W. Va. Cir. Ct. 1983)
Havalunch, Inc. v. Mazza, 294 S.E.2d 70, 75 (W. Va. 1982)

(34) Wisconsin

Fields Foundation, Ltd. v. Christensen, 103 Wis.2d 465, 309 N.W.2d 125 (1981)

Converters Equip. Corp. v.
Condes Corp., 80 Wis.2d
257, 262, 258 N.W.2d
712, 715 (1977)

TABLE B

Virginia Libel Appeals

1925 - 1986

This table summarizes all libel and insulting words cases decided by the Virginia Supreme Court in reported decisions between 1925 and 1986. Set forth after each case are the substance of the alleged libel, the amount of the jury verdict, and the appellate disposition.

The Gazette, Inc. v. Harris, 325 S.E.2d 713 (Va. 1985) (plaintiffs prosecuted for sexual battery; compensatory damages for three plaintiffs of $10,000, $10,000, and $30,000; no punitive damages; affirmed)

Charlottesville Newspapers, Inc. v. Mathews, 325 S.E.2d 713 (Va. 1985) (pregnant plaintiff unmarried; $25,000 compensatory damages; no punitive damages; affirmed)

Port Packet Corp. v. Lewis, 325 S.E.2d 713 (Va. 1985)(child abuse; $50,000 compensatory damages and $100,000 punitive damages; actual damages affirmed, punitive damages reversed)

Kamlar Corp. v. Haley, 224 Va. 699 (1983)(theft; $10,000 compensatory damages on libel and other tort claims; tort verdict not challenged on appeal)

Preston v. Land, 220 Va. 118 (1979) (Crude conduct; compensatory damages of $2,500 and $5,000 for two plaintiffs; reversed)

Newspaper Publishing Corp. v. Burke 216 Va. 800 (1976)(improper conduct by plaintiff physician; $10,000 punitive damages; no compensatory damages; reversed)

Tweedy v. J.C. Penny Co., 216 Va. 596 (1976)(theft; $1,500 compensatory damages; affirmed)

National Association of Letter Carriers v. Austin, 213 Va. 377 (1972) (plaintiffs called "scabs"; $10,000 compensatory and $45,000 punitive damages for each plaintiff; affirmed)

Kroger Co. v. Young, 210 Va. 564 (1976) (theft; $25,000 compensatory damages; reversed)

Zayre, Inc.v. Gowdy, 207 Va. 47 (1966) (shoplifting; $750 compensatory damages on insulting words and false imprisonment claim; affirmed)

Haycox v. Dunn, 200 Va. 212 (1958) (deliberate lie; $65,000 compensatory damages; reversed)

Crawford Co. v. Graves, 199 Va. (1957) (statement denigrating skills of plaintiff doctor; $300 compensatory damages; affirmed)

Alexandria Gazette Corp v. West, 198 Va. 154 (1956)(improper conduct by attorney; $2,500 compensatory damages; reversed)

Luhring v. Carter, 193 Va. 529 (1952) (criminal conduct; $3,000 compensatory damages for insulting words and malicious prosecution; reversed)

Felvey v. Shaffer, 186 Va. 419 (1947) (theft; $15,000 compensatory damages on insulting words and assault claims; affirmed)

Cohen v. Power, 183 Va. 258 (1944) (theft; $1,000 compensatory damages; affirmed)

M. Rosenberg & Sons v. Craft, 182 Va. 512 (1944)(plaintiff allegedly in debt; $400 compensatory damages; reversed)

Fuller v. Edwards, 180 Va. 19 (1942) (verbal abuse of plaintiff; $900 default judgment; affirmed)

Stubbs v. Cowden, 179 Va. 190 (1942) ("whore"; $5,000 compensatory damages; reversed)

Guide Publishing Co.v. Futrell, 175 Va. 77 (1940)(plaintiff married, mother of several children; $500 compensatory damages; reversed)

News Leader Co. v. Kocen, 173 Va. 95 (1939)(crime; $2,500 compensatory damages; reversed)

Federal Land Bank v. Birchfield, 173 Va. 200 (1939)(forgery; $1,500 compensatory damages; reversed)

The Kroger Grocery and Banking Co. v. Rosenbaum, 171 Va. 158 (1938)(theft; $10,000 compensatory damages; affirmed)

People Life Insurance Co. v. Talley, 166 Va. 464 (1936)(writing anonymous letters; $600 compensatory damages; reversed)

Montgomery Ward & Co. v. Nance, 165 Va. 363 (1935)(inefficient job performance; $5,000 compensatory damages; affirmed)

James v. Haymes, 163 Va. 873 (1935) (working slowly on state construction project; $5,000 compensatory damages; reversed)

Madison v. Kroger Grocery Co., 160 Va. 303 (1933)(shoplifting; $250 compensatory damages; reversed)

Bowles v. May, 159 Va. 419 (1932)(illicit affair; $2,500 compensatory damages; reversed)

Weatherford v. Birchett, 158 Va. 741 (1932)(theft; $2,500 compensatory damages; affirmed)

Snyder v. Fatherly, 1258 Va. 335 (1932)(planning to "steal something"; $3,000 compensatory damages; affirmed)

Rosenberg v. Mason, 157 Va. 215 (1931)(theft; $1,500 compensatory damages; reversed)

Chesapeake Ferry Co. v. Hudgins, 155 Va. 874 (1931)(drunkness and having women in room; $7,057.15 compensatory damages; reversed)

Bragg v. Hammack, 155 Va. 419 (1930) (immoral and ungentlemanly conduct; one cent; reversed)

James v. Powell, 154 Va. 96 (1930) (robbery; $1,100 compensatory damages; affirmed)

Powell v. Young, 151 Va. 985 (1928) ("shark" in business; $1,000 compensatory damages; reversed)

Jordan v. Melville Shoe Corp., 150 Va. 101 (1928)(theft; $3,500 damages; reversed)

W.T. Grant Co. v. Owens, 149 Va.906 (1928)(theft; $9,000 compensatory damages; affirmed)

Penick v. Ratliffe, 149 Va. 618 (1927)(bribery; $2,200 compensatory damages; reversed)

The Times-Dispatch Publishing Co. v. Zoll, 148 Va. 850 (1927)(plaintiff arrested; $750 compensatory damages; affirmed)

Wright v. Corfield, 146 Va. 637 (1926) (plaintiff called "cattle"; $1 compensatory damages and $999 punitive damages; affirmed)

Aylor v.Gibbs, 143 Va. 644 (1925) (theft; $1,250 compensatory damagaes; affirmed)

Lightner v. Osborn, 142 Va. 19 (1925) (theft; $3,000 compensatory damages; affirmed)

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

85-2168

Supreme Court, U.S.
FILED
JUL 2 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

JAMES N. FLEMING,

Petitioner,

v.

W. BEDFORD MOORE, III,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

APPENDIX

D. ALAN RUDLIN
W. Jeffery Edwards
HUNTON & WILLIAMS
P. O. Box 1535
Richmond, Virginia 23212
(804) 788-8200

ERIC SCHNAPPER
Counsel of Record
J. LeVonne Chambers
NAACP Legal Defense
& Educational Fund, Inc.
16th Floor
New York, New York 10013

J. BENJAMIN DICK
Suite 2
421 Park Street
Charlottesville,
VA 22901

SAMUEL W. TUCKER
Hill, Tucker & Marsh
P. O. Box 27363
Richmond, Virginia 23261

GERALD E. POINDEXTER
Surry Courthouse
Surry, VA

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

JAMES N. FLEMING,

Petitioner,

v.

W. BEDFORD MOORE, III,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA
APPENDIX

D. ALAN RUDLIN
W. Jeffery Edwards
HUNTON & WILLIAMS
P. O. Box 1535
Richmond, Virginia 23212
(804) 788-8200

ERIC SCHNAPPER
Counsel of Record
J. LeVonne Chambers
NAACP Legal Defense
& Educational Fund, Inc.
16th Floor
New York, New York 10013

J. BENJAMIN DICK
Suite 2
421 Park Street
Charlottesville,
VA 22901

SAMUEL W. TUCKER
Hill, Tucker & Marsh
P. O. Box 27363
Richmond, Virginia 23261

GERALD E. POINDEXTER
Surry Courthouse
Surry, VA

TABLE OF CONTENTS

Circuit Court of Albemarle County, Virginia, Final Judgment Order, April 28, 1978 1

Fleming v. Moore, 221 Va. 884, 275 S.E.2d 632 (1981) 10

Circuit Court of Albemarle County, Virginia, Final Judgment Order, June 3, 1983 33

Circuit Court of Albemarle County, Virginia, Letter from Judge F. W. Harkrader, Jr., April 21, 1983 40

Supreme Court of Virginia, Order granting appeal, June 7, 1984 50

Supeme Court of Virginia, Certificate, June 8, 1984 54

Fleming v. Moore, 229 Va. 783 (1985), pages 783-804, 839-58 56

Supreme Court of Virginia, Mandate, February 1, 1985 115

Circuit Court of Albemarle County, Virginia, Remittitur Hearing, Transcript pages 41-42, April 16, 1985 118

Circuit Court of Albemarle County, Virginia, Final Judgment Order, May 13, 1985 122

Supreme Court of Virginia, Order
denying Petition for Appeal,
January 24, 1986 127

Supreme Court of Virginia, Order
denying Petition for Rehearing,
March 7, 1986 129

Circuit Court of Albemarle County,
Virginia, Transcript pages 28-38,
October 7, 1982 131

Circuit Court of Albemarle County,
Virginia, Transcript pages 21-23,
October 21-22, 1982 147

Circuit Court of Albemarle County,
Virginia, Transcript pages 373-87,
514-23, October 21-22, 1982 152

Circuit Court of Albemarle County,
Virginia, Motion By James N. Fleming
To Set Aside Verdict And Enter Judgment
For Fleming Or, In The Alternative, For
A New Trial, November 19, 1982. 187

James N. Fleming's Advertisement 192

Circuit Court of Albemarle County,
Virginia, Motion to Dismiss,
October 1982 195

Circuit Court of Albemarle County,
Virginia, Memorandum In Support Of
Motion To Set Aside Verdict Or For
New Trial, pages 14-25, 44-47, 57-59,
63-68, November 19, 1982. 198

Circuit Court of Albemarle County,
Virginia, Transcript pages 374-375,
October 1982 233

Circuit Court of Albemarle County, Virginia, Transcript pages 514-522, October 1982 237

Circuit Court of Albemarle County, Virginia, Reply Memorandum On Behalf Of James N. Fleming, pages 14-18, 23-26, December 17, 1982 250

Supreme Court of Virginia, Petition For Appeal - Assignments of Error and Questions Presented, pages 28, 30-31, September 2, 1983 263

Supreme Court of Virginia, Appellant's Brief, pages 35-36, July 18, 1984 273

Supreme Court of Virginia, Petition for Appeal - Assignments of Error and Questions Presented, August 13, 1985 277

Supreme Court of Virginia, Petition for Rehearing, pages 2 and 9, April 1986 279

CIRCUIT COURT OF ALBEMARLE COUNTY, VIRGINIA

W. BEDFORD MOORE, III,

Plaintiff,

v.

JAMES N. FLEMING,

Defendant.

Law No. _____

April 28, 1978

Plaintiff and Defendant, by counsel, came to be heard upon the following pleas and motions on the following dates: on November 30, 1977, on Defendant's Motion for Summary judgment; on December 2, 1977, on Plaintiff's Motion for Leave to Amend his Motion for Judgment previously filed herein, and Defendant's Motions for a Continuance and for leave to file additional pleadings; on December 6, 1977, on Defendant's Plea of the Statute of Limitations, Demurrer to Plaintiff's Amended Motion for Judgment, Amended Grounds of

Defense and Plea of Justification, Motion for Continuance, Motion for Judgment by Default, and Motion for Summary Judgment; and were argued by counsel.

Upon consideration whereof, the Court ADJUDGED and ORDERED:

(1) On December 2, 1977, Defendant was granted leave to file additional pleadings and Defendant's Motion for Summary Judgment and Motion for a Continuance were overruled. On the same date, Plaintiff was granted leave to amend his Motion for Judgment by adding the numbered paragraph (6) which had been filed with the Clerk, but only through and including the second line of the second page of said amendment ending with the sentence which concludes with the words "race or ethnic origin." Plaintiff's Motion for Leave to Amend his Motion for Judgment was denied as to the remainder of said numbered paragraph (6) which follows the sentence ending with the words "race or ethnic origin," to which ruling the Plaintiff objected and duly noted his objections.

(2) On December 6, 1977, Defendant's Plea of the Statute of Limitations, Demurrer to Plaintiff's Amended Motion for Judgment, Motion for Continuance, Motion for Judgment by Default, and Motion for Summary Judgment to Plaintiff's Amended Motion for Judgment were denied and overruled. On the same date, Defendant's Plea of Justification was struck in part and Defendant's Amended Grounds of Defense to Plaintiff's Amended Motion for Judgment were allowed through paragraph (4) thereof, and paragraphs (5) through (8) thereof were stricken.

On December 6, 1977, again the parties, by counsel, came and also a civil panel pursuant to the venire facias heretofore issued. The venire was duly sworn and examined the Court. During the voir dire, Defendant moved for a mistrial, which motion was considered by the Court and overruled. Three members of the venire were excused for cause by the Court and replaced by three additional members who were duly sworn and examined. The venire was then found to be free of exception, whereupon, counsel for the Plaintiff

and counsel for the Defendant jointly, alternately, struck three members from the panel, leaving seven veniremen who were thereupon duly sworn to well and truly try the issues joined between the parties and a true verdict to render according to the law and evidence.

After the opening statements of counsel and the presentation of Plaintiff's evidence, counsel for Defendant moved to strike the Plaintiff's evidence, which motion was argued by counsel, duly considered by the Court and overruled. To which ruling the Defendant objected and noted his exceptions. The Defendant then introduced his evidence and rested. Whereupon counsel for the Plaintiff moved to strike Defendant's evidence regarding his counterclaim. Defendant immediately took a nonsuit on his counterclaim before the Court ruled on Plaintiff's motion to strike.

One of the grounds advanced by the Defendant for his motion to strike was that the publication was not libelous per se and that plaintiff's evidence disclosed no proof of specific damages, which ground the Court duly noted, overruled and found that such

publication was libelous per se, to which ruling the defendant duly objected and excepted. Likewise, in support of his objection to the instructions, defendant advanced the same ground, upon which the same rulings were made by the Court and the defendant duly noted his objections and exceptions.

Whereupon, the Court received proposed instructions from counsel for Plaintiff and counsel for Defendant, granted some, amended some, and refused some. Counsel were then given the opportunity to note their exceptions and objections with regard to the instructions. Thereupon, the Court instructed the jury and counsel made their closing arguments.

The jury retired from the courtroom to consider its verdict.

After due deliberation, the jury returned to the courtroom with the following written verdict:

> We, the Jury, find our verdict for the Plaintiff and award him for general damages, the sum of $10,000.00, and for punitive damages, the sum of $100,000.00.

Kenneth C. Rogers, Foreman.

Whereupon, the Defendant moved to set aside the verdict of the jury and enter a final verdict for the Defendant or in the alternative, to set aside the verdict and award the Defendant a new trial. The Court set dates by which the parties should submit authority and argument with regard to Defendant's motion. On motion of the Defendant agreed to by Plaintiff, the Court subsequently allowed each party three additional days to submit his authority and argument. By agreement of counsel, the Defendant's motion was then submitted to the Court for its decision and after mature consideration, the Court was of the opinion that Defendant's motions should be and were in every respect denied, to which action of the court the Defendant objects.

On April 20, 1978, came the parties again by counsel and the court considered defendant's motion filed on April 19, 1978, for Reconsideration of Defendant's motion for Summary Judgment, etc. After hearing argument of counsel and having duly considered the same the Court doth hereby deny said motion, to which defendant duly objects and excepts.

On the same date last mentioned came the parties by counsel to be heard upon defendant's motion for Remittitur. Upon evidence introduced by the Defendant in support thereof, to which evidence plaintiff objected, and upon the record in this case, and the same was argued by counsel. And the Court thereupon took said motion under advisement.

On the 28th day of April, 1978, came the parties again by counsel and the Court having reviewed portions of the trial transcript doth hereby deny said motion.

It is therefore ADJUDGED and ORDERED that the Plaintiff having judgment against the Defendant, James N. Fleming, in accordance with the aforesaid verdict of the jury in the sum of $110,000.00, plus costs, and interest from December 7, 1977.

And the said Defendant, by counsel, having indicated his intention to petition the Supreme Court of Virginia for an appeal, execution of this judgment is suspended until the Supreme Court acts upon said petition for appeal, and the Defendant, if an appeal is sought,

shall within 30 days post an appeal bond with provisions conditioned according to law in the penalty of Twenty Thousand Dollars ($20,000.00), with approved surety. And the transcript is hereby made a part of the record.

ENTER: /s/ David F. Berry

DATE: 4-28-78

Seen and objected to as
to the amount of bond

/s/ Thomas E. Albro

E. Gerald Tremblay
Thomas E. Albro
Trembly & Smith
105-109 E. High Street
Charlottesville, Virginia 22901
Counsel for Plaintiff

Seen and objected to for all reasons
previously stated including failure of
court to rule for defendant on motions for
summary judgment, motion to strike, motion to
set aside, etc.

/s/ Gerald G. Poindexter

Gerald G. Poindexter
Greene & Poindexter
304 West Cary Street
Richmond, Virginia 23220
Counsel for Defendant

Objected to for reasons previously stated

/s/ Charles Edward Carter

Charles Edward Carter
1790 Broadway
New York, New York 10019

JAMES N. FLEMING,

Appellant,

against

W. BEDFORD MOORE, III,

Appellee.

Record No. 781061

March 6, 1981

221 Va. 884, 275 S.E.2d 632

COCHRAN, J., delivered the opinion of the Court.

W. Bedford Moore, III, initiated this libel action against James N. Fleming in the court below. Final judgment was entered by the trial court on the jury verdict awarding Moore $10,000 in compensatory damages and $100,000 in punitive damages.1/

1/ During oral argument, a motion to dismiss for failure to remedy defects in the appeal bond was renewed. On February 21, 1979, when the appeal was awarded, bond was set by this Court at $120,000. On

(continued)

Moore was a white, tenured, assistant professor in the Humanities Division of the School of Engineering at the University of Virginia during the 1975-76 academic year. His residence known as "Shack Mountain", located in Albemarle County, has architectural significance because of its Jeffersonian styling. The Moore land adjoined a tract known as "Evergreen", owned by Fleming and others and situated near the Rivanna Reservoir.

Fleming, a black real estate broker and developer, sought approval in the fall of 1974, first from the Planning Commission and then from the Board of Supervisors of Albemarle County, to have "Evergreen" rezoned from Agriculture to Residential Planned Unit Development. Upon rezoning, Fleming proposed to construct a planned unit development of high-density

---

(continued from previous page)

March 6, 1979, the Clerk of the Circuit Court certified that Fleming had appeared before her and given bond in the amount of $120,000 with approved surety. We therefore overrule the motion to dismiss. See Code § 8.01-676; Rule 5:31.

residential units for a predominantly black, lower-middle-income group of occupants.

The Planning Commission and Board of Supervisors held several meetings to consider Fleming's application and Moore spoke briefly during two of the meetings in opposition to the proposed development. Moore's position was that the project, if constructed, would create a pollution hazard to the Rivanna Reservoir, which supplies water to the City of Charlottesville, and that it would also detract from the value of his own property. Moore never gave interviews to the press concerning the planned development and never spoke about in public except at the two meetings. During the course of public debate over the proposed development, county planning officials advanced the idea that if Fleming's application for rezoning were to be approved, a tree buffer should be required along the boundary line between the "Evergreen" and "Shack Mountain" properties. Moore felt that the buffer would be a good idea since it would screen his property from the "Evergreen" development. Fleming's plan was reviewed by the

appropriate county agencies, the public was afforded an opportunity to comment on it, and his application for rezoning was subsequently denied by the Board of Supervisors in December, 1975.

In January, 1976, Fleming published in two newspapers a paid advertisement captioned "RACISM" in which Moore was identified by name. The advertisement appeared in the Charlottesville-Albemarle Tribune, a newspaper of general circulation in the community, on January 8, 1976, and in The Cavalier Daily, a university student newspaper, in its January 15 and 16, 1976, editions.2/

2/ The advertisement appeared in print as follows:

(Paid Advertisement)

RACISM

> I have endeavored to realize the opportunity to provide housing and pleasant surroundings for working people--the sort of people who made this the great country that it is.
>
> I do not expect any Farmington members

(continued)

(continued from previous page)

to buy my houses. The tenured position-holders who live off the public dole at the expense of the working people are already well-housed, and could not be expected to live in a racially-integrated neighborhood, anyhow.

There is a great deal of irony in the fact that here in Mr. Jefferson's country 200 years after his vision of situating his beloved Monticello upon the hilltop overlooking the developing community we have a replica of Monticello upon the hill overlooking my property which is occupied by a man who wants to deprive working people of the same opportunities that Mr. Jefferson sought for them. Mr. Jefferson even located his slaves' quarters down the hill from his house, but Bedford Moore, the occupant of little Monticello does not want any black people within his sight.

There is a great conflict waging between the haves and the have-nots. Obviously we have created too much financial security for the tenured segment of the economic community whose greed is repeatedly shown by their expression of "I've got mine--too bad about you."

I am a lover of liberty and freedom of opportunity. I cannot stand by and see the have-nots oppressed by the no-growth people who are living off of our work. I know

(continued)

Claiming that the article injured his reputation in the university community, Moore brought this action for libel.

[1] The first issue on appeal is whether the trial court erred in ruling, as a matter of law, that the article was defamatory per se and in submitting the issue of liability to the jury upon such a theory.3/ At

---

(continued from previous page)

> that this Country did not achieve the highest living standard in the world by no-growth or by oppression of the working man, and yet today the opportunity to improve one's living standard is being violently opposed by the same people who oppose my proposed neighborhood.
>
> Pollution of the reservoir is being used as the current excuse to foster no-growth. The solution, of course, is to remove the guaranteed incomes of these greedy people and put them in the position of seeing the world through the eyes of one seeking the opportunity to improve his or her living standard. Only then would they admit that the pollution excuse is a sham.
>
> I will develop Evergreen, and a lot of people will benefit from it.
>
> SIGNED: JAMES N. FLEMING

3/ It is unclear from the record whether the jury was told that the article, if defamatory at all, was de-

(continued)

trial, counsel for Fleming conceded that the trial court, rather than the jury, should determine whether the article was libelous per se, but he objected to the determination made by the court.

Unlike most states, Virginia makes no distinction between actions for libel and those for slander. Shupe v. Rose's Stores, 213 Va. 374, 375-76, 192 S.E.2d

---

(continued from previous page)

famatory per se. The Appendix includes Instruction No. 8, which so provided, marked "given" by the trial court. Although the transcript records the reading to the jury by the trial court of all other Instructions marked "given", it fails to show that Instruction No. 8 was so read.

Assuming, however, that Instruction No. 8 was not given, we conclude that the trial court submitted the case to the jury upon a theory of per se defamation. Other instructions informed the jury that Moore was presumed to have suffered general damages, and that the absence of actual injury was to be considered only in diminution of damages. The presumption of damages is the critical distinction between defamation per se and other actions for defamation. See Shupe v. Rose's Stores, 213 Va. 374, 376, 192 S.E.2d 766, 767 (1972); Slaughter v. Valleydale Packers, 198 Va. 339, 346-48, 94 S.E.2d 260, 266 (1956). Since the jury instructions allowed the jury to presume damages, the case was presented to the jury on the theory of per se defamation even if Instruction No. 8 was not given.

766, 767 (1972); see Note, Defamation in Virginia--A Merger of Libel and Slander, 47 Va. L. Rev. 1116 (1961); W. Prosser, Torts § 112, at 763 n. 33 (4th ed. 1971). We have held that actions for libel are treated as actions for slander, and that the common-law rules of slander are applicable, so that alleged defamatory language is actionable according to the following principles:

> At common-law defamatory words which are actionable per se are:
>
> (1) Those which impute to a person the commission of some criminal offense involving moral turpitude, for which the party, if the charge is true, may be indicted and punished. (2) Those which impute that a person is infected with some contagious disease, where if the charge is true, it would exclude the party from society. (3) Those which impute to a person unfitness to perform the duties of an office or employment of profit, or want of integrity in the discharge of the duties of such an office or employment. (4) Those which prejudice such person in his or her profession or trade. All other defamatory words which, though not in themselves actionable, occasion a person special damages are actionable.

Shupe, 213 Va. at 376, 192 S.E.2d at 767, quoting Carwile

v. Richmond Newspapers, 196 Va. 1, 7, 82 S.E.2d 588, 591 (1954).

Racism, of course, is neither a contagious disease nor a criminal offense for which a person may be indicted and punished. Thus, a finding of per se defamation in the present case could only be based upon the effect of the allegation upon the plaintiff's work. The trial court ruled, as a matter of law, that the allegation of racism prejudiced Moore in his profession.

To be actionable without proof of "special damages", we have held that the words must contain an imputation that is "necessarily hurtful" in its effect upon plaintiff's business and must affect him in his particular trade or occupation. James v. Haymes, 160 Va. 253, 261-62, 168 S.E. 333, 336 (1933). Accord, W. Prosser, Torts § 112, at 758 (4th ed. 1971) ("defamation of a kind incompatible with the proper conduct of the business, trade, profession or office itself"). There must be a nexus between the content of the defamatory statement and the skills or character required to carry out the particular occupation of the plaintiff. Restatement

(Second) of Torts § 573, Comment e (1976). For example, because an attorney is required to adhere to the disciplinary rules, charging an attorney with unethical conduct is defamatory per se. Carwile, supra, 196 Va. at 8, 82 S.E.2d at 592. The words themselves must necessarily be damaging to the attorney in his profession.

Not every defamatory statement, however, is "necessarily hurtful" to a plaintiff's business and touches the plaintiff in his special trade or occupation. The allegation that a person has refused to pay a money debt is not per se defamatory if that person is not engaged in a vocation in which credit is necessary for the proper and effectual conduct of his business. M. Rosenberg & Sons v. Craft, 182 Va. 512, 519, 29 S.E.2d 375, 378 (1944). Accord, Weaver v. Finance Company, 200 Va. 572, 106 S.E.2d 620 (1959). Likewise, written notice that credit is being denied to a bookkeeper-secretary does not touch the plaintiff in her special trade or vocation. See Shupe, supra. That a defamatory statement may have had an adverse impact upon a plaintiff's work does not make that statement per se

defamatory where the defamation is not "necessarily hurtful" to the plaintiff's business and does not touch the plaintiff in his special trade or occupation.4/

Because libel actions in Virginia are governed by common-law rules applicable to slander actions, libel cases from other jurisdictions are not helpful.5/ There are analogous cases, however, holding that slanderous imputations of Communism do not touch the individual in his chosen profession. See, e.g., Kory v. International Telephone & Telegraph Corp., 444 F. Supp. 193, 196 (S.D.N.Y. 1978) (allegation that journalist, a

---

4/ "Thus, a statement that a physician consorts with harlots is not actionable per se, although a charge that he makes improper advances to his patients is actionable." The former statement does not necessarily affect his reputation as a physician but the latter directly affects it. Restatement (Second) of Torts § 573, Comment e (1976).

5/ Although Annot., 33 A.L.R.2d 1196, § 15 (1954 & Later Case Service) details many cases concerning allegations of racial intolerance, most of the cases concern libelous, not slanderous, statements. In most jurisdictions, libelous statements are actionable without special damages even though they do not touch the plaintiff in his particular trade or vocation. As we have already noted, Virginia does not distinguish between slander and libel actions.

former ambassador, was a Communist held not to be slanderous per se); Gurtler v. Union Parts Mfg. Co., 1 N.Y.2d 5, 150 N.Y.S.2d 4, 132 N.E.2d 889 (1956) (allegation that an engineer was a Communist held not to be slanderous per se).

[3] In the present case, Fleming charged Moore with not wanting blacks to reside within sight of his home, but the allegation of racism was not made in the context of Moore's employment as a teacher.6/ We conclude that, while the allegation might have adversely affected Moore's work, the statements did not necessarily affect him in his particular profession and consequently were not defamatory per se. We hold, therefore, that the trial court erred in ruling that Fleming's advertisement was defamatory per se in that it necessarily was hurtful in its effect upon Moore's employment and adversely affected Moore in his capacity as a teacher. The consequence of this erroneous ruling,

---

6/ The advertisement did not allege, for example, that Moore discriminated against the black students in his classes.

requiring reversal and remand for a new trial, was that the jury was allowed to presume general damages and also to award punitive damages based on the presumed damages.

Since this case must be remanded for a new trial, we will resolve other issues that otherwise may arise again upon retrial.

[4] Fleming contends that Moore was a public figure and thus could not recover damages for defamation in the absence of a showing that the statement was made with "actual malice", that is, with "knowledge that it was false or with reckless disregard of whether it was false or not", as defined in New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964).

The Supreme Court in Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974), provided the following description of a public figure:

> For the most part those who attain this status [of public figure] have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those

> classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.

[5] Moore, a teacher at the University of Virginia, did not occupy a position of "such persuasive power and influence" that he could be deemed a public figure "for all purposes". Thus, we need only determine whether because of his activity relative to the "Evergreen" proposal he was a public figure for that limited purpose.

We do not believe that Moore's role in the public hearings concerning "Evergreen" merits his classification as a public figure. Gertz cautioned that a court must focus upon the "nature and extent of an individual's participation in the particular controversy giving rise to the defamation". 418 U.S. at 352. The mere fact that Moore spoke twice in public hearings concerning the "Evergreen" proposal is not determinative since his use of the public forum substantially resulted from his desire to protect his private interests. In Time, Inc.

v. Firestone, 424 U.S. 448 (1976), the Court held that resort to the judicial process in order to vindicate private rights did not make the plaintiff a public figure. This reasoning appears equally applicable here, where Moore resorted to an administrative body in order to protect the value of his own residence. Moreover, like the plaintiffs in Wolston v. Reader's Digest, Inc., 443 U.S. 157, 167 (1979), and Gertz, Moore never discussed the "Evergreen" proposal with the media. He did not attempt to organize or lead opposition to "Evergreen". Since Moore's involvement at the public hearings was in his capacity as an adjoining private landowner whose property might be affected by the proposed development, we conclude that he was not a public figure. Therefore, he was not required to show, as a prerequisite to recovery of compensatory damages, that Fleming acted with malice that met the New York Times standard.

[6] Fleming further contends, however, that even if Moore was not a public figure, the trial court erred in allowing the jury to award punitive

damages on the basis of common-law malice.7/ In Gertz, the Court condemned the awarding of either presumed or punitive damages, "at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth".8/ 418 U.S. at 349. The award of damages without proof of "actual injury"9/ was condemned as "invit[ing] juries to punish unpopular opinion rather than to compensate individuals for injury

---

7/ The court instructed the jury in Instruction No. 9 that punitive damages could be awarded if the jury believed from a preponderance of the evidence that Fleming acted with "actual malice", that is, that he "was motivated by revenge, personal spite, ill will or a desire to injure the Plaintiff".

8/ Since we have ruled that Moore may not recover presumed damages because the article was not libelous per se, we do not reach Fleming's contention that Gertz would prohibit the awarding of presumed damages without a showing of knowing falsity or reckless disregard for the truth.

9/ The opinion noted that damages for "actual injury" are not limited to out-of-pocket loss, and that trial courts are permitted to compensate for impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Awards must be supported by competent evidence, although it is not necessary that the evidence assign a dollar value to the injury. 418 U.S. at 350.

sustained by the publication of a false fact". Id. On the basis of Gertz, we vacated an award of punitive damages entered against a publisher where the award was based upon a finding of common-law malice, and held that it was necessary to show knowledge of falsity or reckless disregard for the truth by "clear and convincing evidence" before punitive damages could be awarded. Newspaper Publishing Corp. v. Burke, 216 Va. 800, 805, 224 S.E.2d 132, 136 (1976).

Gertz, however, did not explicitly extend its rule to non-media defandants. Indeed, the Supreme Court has recently noted that it has not resolved whether the First Amendment requires application of the New York Times rule in cases involving non-media defendants. Hutchinson v. Proxmire, 443 U.S. 111, 133-34 n. 16 (1979).10/ Since Fleming is not a media defendant and

---

10/ Lower courts are divided on whether the First Amendment protections provided media defendants in New York Times and Gertz are applicable to non-media defendants. Several courts have refused to extend Gertz. Rowe v. Metz, 195 Colo. 424, 579 P.2d 83 (1978), rev'g 39 Colo. App. 20, 564 P.2d 425 (1977); Gengler v.

(continued)

Moore is not a public figure, Gertz does not control the present case. Nevertheless, we share the concern expressed in Gertz at the assessment by juries of punitive damages "in wholly unpredictable amounts bearing no necesssary relation to the actual harm caused". 418 U.S. at 350. Therefore, we hold that any instruction on punitive damages must be structured upon the same standard of proof of "actual malice", as defined in New York Times, applied in Gertz, and followed in Burke, that is

---

(continued from previous page)

Phelps, 92 N.M. 465, 589 P.2d 1056 (1978); Harley-Davidson Motorsports, Inc. v. Markley, 279 Or. 361, 568 P.2d 1359 (1977); Calero v. Del Chemical Corp., 68 Wis.2d 487, 228 N.W.2d 737 (1975). Other courts have refused to distinguish between the protections afforded media and non-media defendants. Bryan v. Brown, 339 So.2d 577, 583-84 (Ala. 1976), cert. denied, 431 U.S. 954 (1977); Millsaps v. Bankers Life Company, 35 Ill, App. 3d 735, 342 N.E.2d 329 (1976); Jacron Sales Co. v. Sindorf, 276 Md. 580, 350 A.2d 688 (1976), aff'g 27 Md. App. 53, 341 A.2d 856 (1975); Ryder Truck Rentals v. Latham, 593 S.W.2d 334 (Tex. Civ. App. 1979). See J. Eaton, The American Law of Defamation Through Gertz v. Robert Welch, Inc., and Beyond: An Analytical Primer, 61 Va. L. Rev. 1349, 1417 (1975), predicting extension by the Supreme Court of Gertz to defamation suits against non-media defendants where the defamatory falsehood was published by the press.

required in defamation actions against media defendants, i.e., clear and convincing proof of knowledge of falsity or reckless disregard for the truth.

[7] In conformity with the general rule in tort actions, no punitive damages may be awarded for slander or libel unless compensatory damages are awarded. As an exception to the rule it is generally held that in a slander or libel action, where the defamation is actionable per se, punitive damages alone may be awarded. We approved the rule and the exception in Burke, supra, 216 Va. at 805, 224 S.E.2d at 136. As the advertisement in the present case was not actionable per se, the exception is not applicable.

[8] Moore did not allege or prove that he suffered any monetary loss. He did allege, however, that he had been insulted, mortified, held up to ridicule, and humiliated by the statement. We conclude that in libel actions not based upon per se defamation, where knowing falsity or reckless disregard for the truth is not shown, the compensatory damages should be limited to the actual damages proved to have been sustained, but

such damages should not necessarily be restricted to out-of-pocket loss. See fn. 10 supra. Therefore, we hold that Moore is entitled to recover compensatory damages upon proof of actual injury, including such elements as damage to his reputation and standing in the community, embarrassment, humiliation, and mental suffering. "Special damages", which under the common-law rule must be shown as a prerequisite to recovery where the defamatory words are not actionable per se, are not to be limited to pecuniary loss. To the extent that language in Shupe may be construed to indicate that emotional upset and embarrassment cannot constitute "special damages", it is hereby modified.

For the reasons assigned, the judgment of the trial court will be reversed and the case remanded for a new trial consistent with the views herein expressed.

Reversed and remanded.

HARRISON, J., dissenting.

I find the jury's awards totalling $110,000 in this case to be shocking. It is inconceivable that a respected professor, as is Mr. Moore, could have been damaged in the University community or elsewhere by the "advertisement" which appeared at the behest of Mr. Fleming.

I attach little significance to the word "racism" which heads the advertisement. The words "racism" and "racist" are bandied about in our society with complete abandon. People of all races currently utilize these terms to voice their innumerable real and imagined grievances. Indeed, it would not be difficult to find a newspaper which contains a complaint by one party against another for some action allegedly grounded in "racism", or "reverse racism."

When we examine the advertisement inserted in the papers and strip therefrom Fleming's self-laudatory and hortatory language, we find that he takes a dim view of Farmington members and tenured

professors and feels that without their financial security they would be more sympathetic to the "have nots." The advertisement then makes a comparison between Thomas Jefferson and Professor Moore in which the latter emerges "second best." Fleming attempts to make his point by stating that Jefferson located his slave quarters in sight of Monticello, whereas Moore does not want black people in his sight. This apparently refers to Moore's approval of the suggested location of a tree buffer or screen between his property and Fleming's proposed development.

The advertisement is in bad taste and is ill-mannered, short-tempered, and indiscreet. It is poorly conceived and intemperate diatribe by an irate, disappointed, and frustrated black real estate developer who believes that his white opponent in a rezoning matter is not as concerned with pollution as he is apprehensive over the prospect of a "predominantly black, lower-middle-income" development adjoining his property. However, this reaction by Fleming was predictable and could well have been anticipated by Professor Moore

when he left the academic community and entered the realm of real estate development and the controversial arena of zoning. The language of the market place is not always restrained, reasonable, or temperate. It is often sharp and unfair, and sometimes raucous, biting, and cruel.

Although the indignation of Professor Moore is understandable we should not allow the publication involved here to be the predicate of an action for libel and an award of damages. I would enter final judgment for the defendant.

CIRCUIT COURT OF ALBEMARLE COUNTY, VIRGINIA

W. BEDFORD MOORE, III,

Plaintiff,

v.

JAMES N. FLEMING,

Defendant.

Law No. 976-L

June 3, 1983

VIRGINIA:

IN THE CIRCUIT COURT OF ALBEMARLE COUNTY

W. BEDFORD MOORE, III,	)	
	)	
Plaintiff,	)	
	)	
v.	)	AT LAW NO. 976
	)	
JAMES N. FLEMING,	)	
	)	
Defendant.	)	

FINAL JUDGMENT ORDER

On October 21, 1982 came the parties, in

person and by counsel, and also a civil panel pursuant to a venire facias heretofore issued. The venire was duly sworn and examined by the Court. One member of the venire was excused for cause by the Court and replaced by one additional member who was duly sworn and examined. Counsel for the Plaintiff and counsel for the Defendant each alternately struck three members from the panel, leaving seven veniremen. Defendant moved to dismiss the venire so constituted on the grounds that plaintiff struck the only two blacks on the venire and that no blacks remained in the venire after such strikes, which motion was overruled by the Court.

After the opening statements of counsel and the presentation of Plaintiff's evidence, counsel for Defendant moved to strike the Plaintiff's evidence, which motion was argued by counsel, duly considered by the Court and overruled, to which ruling the Defendant objected and noted his exceptions. The Defendant then introduced his evidence and rested. Plaintiff introduced evidence in rebuttal and rested, whereupon Defendant renewed his motion to strike Plaintiff's evidence, which motion was overruled by the Court.

Whereupon, the Court received proposed instructions from counsel for Plaintiff and counsel and Defendant, granted some, amended some, and refused some. Counsel for the parties noted their exceptions and objections regarding the instructions. Thereupon, the Court instructed the jury and counsel made their closing arguments.

The jury retired from the courtroom to consider its verdict.

After due deliberation, the jury returned to the courtroom with the following written verdict:

> We, the jury, upon the law and the evidence, find our verdict for the plaintiff, W. Bedford Moore, III, against the defendant and award him compensatory damages in the amount of $100,000.00 and punitive damages in the amount of $250,000.00, together with interest on the amount of $250,000.00 at the rate of 12% per year from January 16, 1976.
>
> Mimi E. Hirsch, Foreman.

Whereupon, the Defendant orally moved the Court to set aside the verdict of the jury as contrary to the law and the evidence and enter judgment for the Defendant, which motion the Court denied with leave

for Defendant to file a written motion to set aside the verdict or in the alternative for a new trial. Defendant thereafter filed a written Motion To Set Aside Verdict And Enter Judgment for Fleming Or, In the Alternative, For A New Trial together with supporting memoranda. Defendant, in turn, filed a Memorandum In Opposition To Motion To Set Aside Verdict For A New Trial. By letter dated February 25, 1983 the Court requested argument ore tenus from counsel for the parties limited to the question of whether the Court should order remittitur. After consideration, the Court denied Defendant's written post-trial Motion to which action of the court the Defendant objects. The opinion of the Court is found in a letter to counsel dated April 21, 1983 which is made a part of the record.

It is ADJUDGED, ORDERED and DECREED that the Plaintiff have judgment against the Defendant, James N. Fleming, in accordance with the aforesaid verdict of the jury in the sum of Three Hundred Fifty Thousand Dollars ($350,000.00) and costs, and interest at the rate of twelve (12) percent per annum on

the sum of Two Hundred Fifty Thousand Dollars ($250,000.00) from January 16, 1976.

It is FURTHER ADJUDGED, ORDERED AND DECREED that, pursuant to Rule 5:9, Rules of the Supreme Court of Virginia, the transcript of hearings ore tenus held on January 29, 1982. October 7, 1982 and March 28, 1983, and the transcript of the trial held on October 21 and 22, 1982, be and the same are hereby made part of the record in this case.

Defendant having indicated his intention to appeal this order to the Supreme Court and having moved the Court to suspend execution of the judgment entered herein, the Court hereby ORDERS that execution of this judgment is suspended so long as Defendant timely prosecutes the appeal and thereafter so long as the matter is under consideration by the Supreme Court, provided however that Defendant or someone for him shall fine an appeal bond in the Office of the Clerk of this Court within thirty (30) days of the entry of this order, with surety approved by the Judge of this Court, in the penalty of two hundred fifty thousand Dollars

($250,000.00) reciting this judgment, and Defendant's intention to present a petition for appeal and the other conditions set forth in Section 8.01-676(A) of the Code of Virginia (1950), as amended.

ENTER:/s/F. W. Harkrader, Jr.

DATE: 6/3/83

I ask for this:

/s/Thomas E. Albro
Thomas E. Albro
Barrett E. Pope
Smith, Taggart, Gibson & Albro
105-109 E. High Street
Charlottesville, VA 22901

Counsel for plaintiff

Seen and objected to:

/s/L. B. Cann, III
D. Alan Rudlin
L. B. Cann, III
Hunton & Williams
P. O. Box 1535
Richmond, VA 23219

Gerald G. Poindexter
P. O. Box 766
Surry, VA 23883

Counsel for defendant

CIRCUIT COURT OF ALBEMARLE COUNTY, VIRGINIA

W. BEDFORD MOORE, III,

Plaintiff,

v.

JAMES N. FLEMING,

Defendant.

Law No. 976-L

April 21, 1983

April 21, 1983

Mr. Thomas E. Albro
Smith, Taggart, Gibson & Albro
Attorneys at Law
P. O. Box 1585
Charlottesville, Virginia 22901

Mr. John Charles Thomas
Hunton & Williams
Attorneys at Law
P.O. Box 1535
Richmond, Virginia 23212

Mr. Gerald G. Poindexter
Poindexter & Poindexter
Attorneys at Law
P. O. Box 766
Surry, Virginia 23883

Re: W. Bedford Moore, III
v.
James N. Fleming

Gentlemen:

The Court again takes the opportunity to thank counsel for their careful briefing and thoughtful arguments in this case.

A careful review of the Court's rulings on motions made and objections taken in the light of the arguments raised in your respective briefs leads us to the conclusion that the Court's rulings were proper. Our review of the Court's rulings on instructions finds those rulings proper, and further that the jury was properly instructed.

On the question as to whether or not the evidence supports the jury verdict, we conclude that it does. Evidence of damages as the Supreme Court has stated in the first trial of Moore v. Fleming should not necessarily be restricted to out-of-pocket loss. "...Moore is entitled to recover compensatory damages upon proof of actual injury including such elements as damage to his reputation and standing in the community, embarrassment, humiliation, and mental suffering." We find that there is ample evidence of the elements of actual injury, when so defined.

In giving consideration to the implications of the size of the verdict and specifically whether or not remittitur should be allowed under the circumstances, we must consider whether or not the jury was laboring under a misconception of the law, or the evidence or whether there was some other error or mistake, or if the jury was motivated by prejudice or sympathy. In effect, we must consider whether or not the jury verdict was based on the evidence. Viewing the evidence in the light most favorable to the jury verdict, we have evidence of deliberate and highly inflammatory false statements interjected deliberately into a highly sensitive academic community where such charges were extremely damaging. Under all the circumstances as revealed by the evidence we cannot say that the jury verdict is unsupported.

We deny the motion to set aside the jury verdict and to grant a new trial. The jury is the conscience of the community. Apparently this was a jury that felt strongly about the curse of racism and wished to make a strong statement about the unjustified use of the epithet of racism.

We conclude that the Court should enter judgment on the verdict in the full amount of the award including the prescribed interest. We ask that Mr. Albro prepare the Order and circulate it for endorsement by counsel of record, before presentation to the Court.

Sincerely,

/s/F. W. Harkrader, Jr., Judge
F. W. Harkrader, Jr., Judge

FWHjr/bl

cc: Shelby Marshall, Clerk

PUBLISHER'S NOTE:

The following pages are unavailable for filming:

44,45,46,47,48,49

SUPREME COURT OF VIRGINIA

JAMES N. FLEMING,

Appellant,

-against-

W. BEDFORD MOORE, III,

Appellee.

Record No. 831446

June 7, 1984

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 7th day of June, 1984

James N. Fleming, Appellant,

against Record No. 831446
Circuit Court No. 976-L

W. Bedford Moore, III, Appellee.

From the Circuit Court of Albemarle County

Upon the petition of James N. Fleming an

appeal is awarded him from a judgment rendered by the Circuit Court of Albemarle County on the 3rd day of June, 1983, in a certain proceeding then therein depending, wherein W. Bedford Moore, III, was plaintiff and the petitioner was defendant.

And it appearing that an appeal bond in the penalty of $250,000, conditioned according to law, has heretofore been given in accordance with the provisions of section 8.01-676 of the Code, additional bond is required in the amount of $460,000.

This appeal, however, is limited to the consideration of assignments of error D, E, G and H which read as follows:

D The jury's award is so excessive that it indicates the jury was influenced by passion, prejudice or corruption, or misconceived or misconstrued the law or facts.

E The jury's award of prejudgment interest at the rate of 12% per annum is contrary to law because prejudgment interest is not allowable on punitive damages and, further, because 12% exceeds the maximum allowable rate of prejudgment interest.

G The trial court erred in refusing to instruct the jury that, in order to find Fleming liable for compensatory damages, it must find that Fleming knew what he was publishing was false or had reckless disregard for whether or not it was true.

H The trial court erred in refusing to strike plaintiff's evidence on punitive damages because there was insufficient evidence on which the jury could conclude that Fleming knew what he was publishing was false or had reckless disregard for whether or not it was true.

On further consideration whereof, it is ordered that the parts of the record to be printed or reproduced in the appendix are to be limited to those parts of the record germane to assignments of error No. D, E, G and H, and the briefs to be filed shall be limited to such discussion as is relevant to the assignments of error upon which this appeal is awarded.

The petition for appeal is refused as to the remaining assignments of error.

A Copy,

Teste:/s/ Allen L. Lucy
Clerk

Supreme Court of Virginia

James N. Fleming, Appellant,

against Record No. 831446
Circuit Court No. 976-L

W. Bedford Moore, III, Appellee.

From the Circuit Court of Albemarle County

CERTIFICATE

Pursuant to Rule 5:30 of the Rules of the Supreme Court of Virginia, I, Allen L. Lucy, Clerk of the said Court, do hereby certify that on June 7, 1984, an appeal was awarded from a judgment rendered by the court below on June 3, 1983, in the suit therein depending under the short style of **W. Bedford Moore, III** v. **James N. Fleming.**

Additional bond is required in the penalty of $460,000 in conformity with Code § 8.01-676.

This certificate, constituting the summons on appeal, was this day mailed to the court below and to

D. Alan Rudlin, P.O. Box 1535, Richmond, Virginia 23212

L. B. Cann, III, P.O. Box 1535, Richmond, Virginia 23212

W. Jeffery Edwards, P.O. Box 1535, Richmond, Virginia 23212

Gerald G. Poindexter, P.O. Box 766, Surry, Virginia 23883

Counsel for Appellant

Thomas E. Albro, 105-109 East High Street, P.O. Box 1585, Charlottesville, Virginia 22902

Barrett E. Pope, 105-109 East High Street, P.O. Box 1585, Charlottesville, Virginia 22902

Counsel for Appellee

Given under my hand this 8th day of June, 1984.

/s/ Allen L. Lucy
Clerk

JAMES N. FLEMING,

Appellant,

-against-

W. BEDFORD MOORE, III,

Appellee.

Record No. 831446

February 1, 1985

229 Va. 783

(Pages 783-804, 839-58)

In one opinion, we decide four libel appeals. The plaintiffs are private individuals, not public officials or public figures. Three of the appeals are based on suits against members of the print media. In the fourth appeal, the defendant is a private person. Judgments for compensatory damages have been entered against the defendant in each case. In two cases, the judgments include awards of punitive damages.

The dominant issue to be decided in each case is what standard of liability should govern an award of compensatory damages in a libel action in Virginia,

given the developments in federal constitutional law on the subject of libel beginning with New York Times Co. v. Sullivan, 376 U.S. 254 (1964). Adjudication of this central question will spawn subsidiary issues common to all the suits. In addition, the awards of punitive damages generate issues common to those two cases. The common questions of law will be analyzed in the first sections of this opinion and, in succeeding sections, the issues peculiar to a specific case will be adjudicated in the section of the opinion devoted to such case.

I. The Dominant Issue

A. Virginia Background

In Virginia, as in other states, the law of defamation historically has protected a basic interest. The individual's right to personal security includes his uninterrupted entitlement to enjoyment of his reputation. Fuller v. Edwards, 180 Va. 191, 197, 22 S.E.2d 26, 29 (1942). "Society has a pervasive and strong interest in preventing and redressing attacks upon reputation. Rosenblatt v. Baer, 383 U.S. 75, 86 (1966).

Under the general framework of defamation law in Virginia prior to 1964, the beginning of a period when major aspects of libel law became federalized, the defamed private citizen had to prove only a false publication that included words which were either actionable per se according to certain fixed principles, or, if not defamatory per se, words which resulted in special damages to the party defamed. See M. Rosenberg & Sons v. Craft, 182 Va. 512, 518, 29 S.E.2d 375, 378 (1944). Upon such publication,11/ malice was inferred and damage to reputation was presumed. See Note, Defamation in Virginia - A Merger of Libel and Slander, 47 Va.L.Rev. 1116, 1117 (1961). And, unless the otherwise libelous statement was privileged or the defendant could establish its truth, Rosenberg v. Mason, 157 Va. 215, 228, 160 S.E. 190, 195 (1931), the publisher was liable for compensatory damages. Upon proof of common-law actual

---

11/ No publication is required in an action brought under the Virginia statute of insulting words, Code § 8.01-45. Davis v. Heflin, 130 Va. 169, 107 S.E. 673 (1921).

or express malice, the plaintiff was entitled to an award of punitive damages. James v. Haymes, 160 Va. 253, 263, 168 S.E. 333, 337 (1933).

Commencing in 1964, however, a series of decisions of the United States Supreme Court caused significant changes in the law of libel.

B. Pertinent Supreme Court Decisions

In New York Times Co. v. Sullivan, the Supreme Court determined for the first time the extent to which the constitutional protections of speech and press limit a state's power to award damages in a libel action brought by a public official against critics of his official conduct. 376 U.S. at 256. The Court decided that the rules of law applied by the Alabama state courts were constitutionally deficient for failure to provide safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by such a public official. Id. at 264. The Court held that "[t]he constitutional guarantees require . . . a federal rule that prohibits a public official

from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' - that is, with knowledge that it was false or with reckless disregard of whether it was false or not." Id. at 279-80. In Garrison v. Louisiana, 379 U.S. 64 (1964), the Court applied the New York Times "actual malice" standard to state criminal libel statutes that imposed sanctions for criticism of official conduct of public officials.

In Curtis Publishing Co. v. Butts, 388 U.S. 130 (1966), the Court held "that a 'public figure' who is not a public official may . . . recover [compensatory and punitive] damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." Id. at 155. In holding that the standard had been met by the plaintiff in Butts, but not in the companion case of Associated Press v. Walker (decided in the same opinion), the Court rejected the

defendant's contention that it could not be subjected to an assessment of punitive damages. Justice Harlan, writing for the majority, stated: "Where a publisher's departure from standards of press responsibility is severe enough to strip from him the constitutional protection our decision acknowledges, we think it entirely proper for the State to act not only for the protection of the individual injured but to safeguard all those similarly situated against like abuse." Id. at 161.

In St. Amant v. Thompson, 390 U.S. 727 (1968), the Court identified evidence that may be employed to establish New York Times "actual malice." The majority, through Justice White, noted that "evidence of either deliberate falsification or reckless publication 'despite the publisher's awareness of probable falsity' was essential to recovery by public officials in defamation actions." Id. at 731. The Court then listed certain acts which show the "recklessness" aspect of "actual malice": intentional fabrication by a defendant of facts or communications; basing an article wholly upon an unverified anonymous telephone call; printing

allegations so inherently improbable that only a reckless person would put them in circulation; and publication of an article despite obvious reasons to doubt the truth and veracity of the informant upon whom the article relies for accuracy. Id. at 732. The Court said that failure to investigate will not in itself establish bad faith, id. at 733, but stated that a "defendant in a defamation action brought by a public official cannot . . . automatically insure a favorable verdict by testifying that he published with a belief that the statements were true." Id. at 732.

In Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971), a plurality of the Court, through Justice Brennan, extended the New York Times "actual malice" standard to publications relating to all matters of public or general concern, irrespective of the public or private nature of the plaintiff. In rejecting the suggested distinction between public officials and public figures on the one hand and private individuals on the other, Justice Brennan focused instead on society's interest in learning about issues of public or general concern. Thus, under Rosenbloom, once a trial court determined that

the alleged libel involved a matter of public or general concern, the fact finder should then consider whether New York Times malice had been proved, paying no heed to the plaintiff's status.

Three years later, in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), the Supreme Court expressly repudiated its holding in Rosenbloom. One commentator states that the Gertz majority sensed "the Rosenbloom plurality opinion had nearly destroyed the common law of defamation. . . ." J. Eaton, The American Law of Defamation Through Gertz v. Robert Welch, Inc., and Beyond: An Analytical Primer, 61 Va.L.Rev. 1349, 1409 (1975).

In Gertz, a Chicago policeman had shot and killed a youth. Gertz, a reputable attorney, was employed to represent the youth's family in civil litigation against the officer. The defendant published, in its monthly magazine giving the views of the John Birch Society, false statements about Gertz. The publication implied that Gertz had a criminal record and labeled him a "Leninist" and "Communist-fronter."

Justice Powell, writing for the majority, articulated several important holdings defining "the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment." 418 U.S. at 325. First, the Court reaffirmed its rulings in New York Times and Butts stating that public officials and public figures may recover for defamation only upon clear and convincing proof of New York Times malice. Second, the Court made clear that all persons, public or private, may recover presumed or punitive damages only upon clear and convincing proof of New York Times malice.

Third, and most important for purposes of the cases at bar, the Court held "that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." Id. at 347. Justice Powell stated that this approach establishes an equitable boundary between the competing interests involved. "It recognizes the strength of the legitimate state interest in

compensating private individuals for wrongful injury to reputation, yet shields the press and broadcast media from the rigors of strict liability for defamation." Id. at 348.

The Court, however, expressly limited the applicability of a fault standard. Such limitation has not been sufficiently emphasized in many of the decisions and comments based on Gertz, but we think recognition of the limitation is essential to an accurate analysis of the decision. The Court said, quoting from Butts, the applicability of a fault standard must be restricted to circumstances where "the substance of the defamatory statement 'makes substantial danger to reputation apparent.'" Id. Continuing, the Court stated: "Our inquiry would involve considerations somewhat different from those discussed above if a State purported to condition civil liability on a factual misstatement whose content did not warn a reasonably prudent editor or broadcaster of its defamatory potential." Id.; Time, Inc. v. Firestone, 424 U.S. 448, 464-65 (1976) (Powell, J., concurring).

In addition, the Court said that the State's interest in compensating private individuals for injury to reputation extends no further than compensation for actual injury, which may include impairment of reputation and standing in the community, personal humiliation, mental anguish and suffering, as well as out-of-pocket loss. Gertz, 418 U.S. at 350. Finally, the Court rejected the Rosenbloom plurality's requirement that judges must consider whether publications address issues of "general or public interest," stating that such a test "for determining the applicability of the New York Times standard to private defamation actions inadequately serves both of the competing values at stake." Id. at 346.

In Herbert v. Lando, 441 U.S. 153 (1979), the Supreme Court rejected a plea "that the balance struck in New York Times should now be modified to provide further protections for the press when sued for circulating erroneous information damaging to individual reputation." Id. at 169. The Court, through Justice White, noted that the 1964 New York Times decision which "was widely perceived as essentially protective of

press freedoms," has been repeatedly affirmed in succeeding cases. Id. The Court also pointed out, however, citing Firestone and Gertz, that "the Court has reiterated its conviction--reflected in the laws of defamation of all of the States--that the individual's interest in his reputation is also a basic concern." Id.

C. Pertinent Virginia Decisions Since New York Times

Sanders v. Times-World Corp., 213 Va. 369, 192 S.E.2d 754 (1972), was decided after New York Times and Rosenbloom, but before Gertz. There, for the first time, we applied the New York Times malice standard to a libel case involving a private person arising from matters of "public or general concern," as required by Rosenbloom. "In Rosenbloom and Sanders, the relevant test was not the status of the plaintiff involved but rather the events which were the subject of the publication." Newspaper Publishing Corp. v. Burke, 216 Va. 800, 803, 224 S.E.2d 132, 135 (1976). In Sanders, we cited three earlier Virginia cases, from 1961, 1967, and 1970 respectively, for the proposition that, where

defendants' statements were qualifiedly privileged, the plaintiff bears the burden to establish actual malice. The Sanders decision was based, nevertheless, on the federal standards of New York Times and Rosenbloom.

Newspaper Publishing Corp. v. Burke, supra, was the first libel case we decided after Gertz. Analyzing Gertz, we held that the trial court erroneously instructed the jury, in violation of the Gertz admonition, that the newspaper defendant could be adjudged liable without fault to the private plaintiffs. Additionally, the Court determined that the trial court incorrectly told the jury that an award of punitive damages could be premised upon a finding of common-law malice rather than New York Times "actual malice."12/ Furthermore, while recognizing that we could define our own standard for recovery of actual, compensatory damages as authorized by Gertz, we chose not to formulate a

---

12/ For a definition of common-law malice, see also Preston v. Land, 220 Va. 118, 120-21, 255 S.E.2d 509, 511 (1979), a post-Gertz case of slander among private individuals in which the federal libel standards were not in issue.

Virginia standard in that case. We noted that the jury did not award actual damages, only punitive damages, and termed the task of fixing a Gertz-approved standard "unnecessary." 216 Va. at 804, 224 S.E.2d at 136.

In Fleming v. Moore, 221 Va. 884, 275 S.E.2d 632 (1981) (hereinafter Fleming I), a suit against a non-media defendant and the precursor to the instant case of the same name, we decided that the publication was not defamatory per se; that the plaintiff, a private individual, did not forfeit his private status by speaking at public hearings involving land use proposals; that because the plaintiff Moore was not a public figure, he was not required to show New York Times malice as a prerequisite to recovery of compensatory damages, id. at 892, 275 S.E.2d at 637; that punitive damages may not be awarded without a tandem award of compensatory damages, unless the libel involved was "actionable per se," id. at 893-94, 275 S.E.2d at 638; and, that in libel actions not based upon per se defamation where New York Times malice is not shown, compensatory damages must be limited to actual injuries sustained. We decided,

however, that actual injury was not confined to pecuniary loss but included such elements as damage to reputation and standing in the community, embarrassment, humiliation, and mental suffering. We modified language contained in Shupe v. Rose's Stores, 213 Va. 374, 192 S.E.2d 766 (1972), to the extent that Shupe may have indicated that emotional upset and embarrassment cannot constitute "special damages." 221 Va. at 894, 275 S.E.2d at 639.

In Fleming I, we further decided that Gertz did not control because the Gertz rule was not explicitly extended to non-media defendants. We stated, nevertheless, that we share the Gertz concern with the assessment by juries of punitive damages "'in wholly unpredictable amounts bearing no necessary relation to the actual harm caused.'" Id. at 893, 275 S.E.2d at 638, quoting Gertz, 418 U.S. at 350. Thus, we held in Fleming I, a suit by a private individual against a non-media defendant, that a recovery of punitive damages must be based upon the New York Times actual malice standard that is applicable to media defendants, that is,

clear and convincing proof of knowledge of falsity or reckless disregard for the truth.

D. The Virginia Standard of Fault for Compensatory Damages

The parameters within which we must fix the Virginia standard as a matter of state law have been set forth in our prior discussion of Gertz. The plaintiffs in the present appeals argue for a negligence standard. Generally, the defendants assert that a defamed private individual should be required to establish New York Times malice to recover actual, compensatory damages in this State. In a brief amicus curiae filed in one of the media appeals, the Virginia Press Association, Inc., argues that "a negligence standard is no standard at all" and that such a requirement "simply does not provide the protection needed to ensure a free and open press." Asserting that the matters involved in these four appeals involve issues of public concern, the defendants contend that our pre-Gertz Sanders decision is controlling and that liability for the alleged defamations requires proof of New York Times "actual malice." We do not agree.

The Supreme Court in Gertz left little doubt that it expected many of the states to adopt a negligence standard. Justice Powell, while noting that allowance of presumed damages would unnecessarily exacerbate the danger of media self-censorship, stated that the policy considerations concerning punitive-damage awards are "wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions." 418 U.S. at 350. Justice Blackmun, concurring, flatly said "that the Court now conditions a libel action by a private person upon a showing of negligence, as contrasted with a showing of willful or reckless disregard. . . ." Id. at 353. Chief Justice Burger, dissenting, said that the majority "introduces the concept that the media will be liable for negligence in publishing defamatory statements with respect to [ordinary private citizens]. Id. at 355. Justice Brennan, dissenting, forecast adoption of "a reasonable-care standard" by many states as the "probable result of today's decision." Id. at 366. Justice White, dissenting and deploring the "additional burden on the plaintiff of proving negligence

or other fault," stated that "[u]nder the new rule the plaintiff can lose, not because the statement is true, but because it was not negligently made." Id. at 376.

Certainly, despite the Supreme Court's forecasts, we properly may choose to adopt as a matter of state law a stricter standard than ordinary negligence. We will not do so. Indeed, while we did not explicitly fix the standard in Fleming I, we implicitly indicated that a level of liability less than New York Times malice was all that was required. We said: "Therefore, [the plaintiff] was not required to show, as a prerequisite to recovery of compensatory damages, that Fleming acted with malice that met the New York Times standard." 221 Va. at 892, 275 S.E.2d at 638.

We hold, therefore, that in an action brought by a private individual to recover actual, compensatory damages for a defamatory publication, the plaintiff may recover upon proof by a preponderance of the evidence that the publication was false, and that the defendant either knew it to be false, or believing it to be true, lacked reasonable grounds for such belief, or acted

negligently in failing to ascertain the facts on which the publication was based. Under this standard, truth no longer is an affirmative defense to be established by the defendant. Instead, the plaintiff must prove falsity, because he is required to establish negligence with respect to such falsity. In addition, we hold that such liability may be based upon negligence, whether or not the publication in question relates to a matter of public or general concern.

The application of this negligence standard is expressly limited, however, to circumstances where the defamatory statement makes substantial danger to reputation apparent. The trial judge shall make such determination as a matter of law. If, on the other hand, no substantial danger to reputation is apparent from the statement in issue, New York Times malice must be established to recover compensatory damages.

Nothing in the public policy of the Commonwealth or in our prior decisions requires adoption of a standard higher than one of ordinary negligence. The Constitution of Virginia does not mandate embracement

of a more stringent standard. Article I, § 12 provides, in part, "that any citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right. . . ." That provision recognizes the balance to be struck between the right of free expression enjoyed by the individual and the press on the one hand and the right of defamed individuals to hold the speakers "responsible" for damage to reputation on the other. See I A. Howard, Commentaries on the Constitution of Virginia, at 249-59 (1974). And, as we already have said, our Sanders decision is not controlling, because it was decided before Gertz and was based on Rosenbloom, nor are any of our other cases.

Moreover, we think that a negligence test strikes a proper balance between the rights of the news media and the rights of private individuals. As noted in Gertz, the private individual is more vulnerable to injury to reputation inflicted by defamatory falsehood than are public officials and public figures who ordinarily "enjoy significantly greater access to channels of effective communication and hence have a more realistic

opportunity to counteract false statements than private individuals normally enjoy." Gertz, 418 U.S. at 344. Even though "the truth rarely catches up with the lie," id. n.9, the opportunity for rebuttal is more readily available to the public person. Consequently, the state interest in protecting the private individual is greater than in the case of a non-private person.

In addition, we believe that the negligence standard will not result in self-censorship, as the media defendants argue, and that the duty of reasonable care is an acceptable burden for the press to bear. After all, the concept of negligence is fundamental to the imposition of tort liability in Virginia in the great majority of legal relationships that are created daily, and we have not been convinced that the publisher of the defamatory falsehood should be elevated to a preferred status for the assessment of liability for the harm caused by such a tort. Neither the intentional lie nor the negligent error substantially advances society's interest in uninhibited and robust debate. See id. at 340.

Also, the limitations we have placed on the rule will serve to insulate the publisher from liability based on a publication the content of which does not warn a reasonably prudent editor or broadcaster of its defamatory potential. In such a case, New York Times malice must be established in order to recover compensatory damages. The mere negligent error or the careless misstatement of fact which, on its face, does not appear to be defamatory will not result in liability for compensatory damages being imposed on the publisher.

Finally, the standard we adopt today is in accord with the rule embraced by a substantial number of the states that have decided the issue since Gertz. See E. Collins and J Drushal, The Reaction of the State Courts to Gertz v. Robert Welch, Inc., 28 Case W.Res.L.Rev. 306 (1978). To date, at least 30 states and the District of Columbia have adopted a negligence standard in media cases involving private persons, either after discussing the issue or without discussing the question.13/ Also, two federal courts interpreting Virginia

---

13/ The cases that discuss the issue are: Peagler v. Phoenix Newspapers, Inc., 114 Ariz. 309, 560 P.2d 1216

(continued)

law after Gertz anticipated that we would adopt a negligence standard. See General Products Co. v. Meredith

---

(continued from previous page)

(1977); Dodrill v. Arkansas Democrat Co., 265 Ark. 628, 590 S.W.2d 840 (1979), cert. denied, 444 U.S. 1076 (1980); Phillips v. Evening Star Newspaper Co., 424 A.2d 78 (D.C. 1980), cert. denied, 451 U.S. 989 (1981); Miami Herald Publishing Co. v. Ane, 423 So.2d 376 (Fla. App. 1982); Cahill v. Hawaiian Paradise Park Corp., 56 Hawaii 522, 543 P.2d 1356 (1975); Troman v. Wood, 62 Ill.2d 184, 340 N.E.2d 292 (1975); Gobin v. Globe Publishing Co., 216 Kan. 223, 531 P.2d 76 (1975); McCall v. Courier-Journal & Louisville Publishing Co., 623 S.W.2d 882 (Ky. 1981), cert. denied, 456 U.S. 975 (1982); Wilson v. Capital City Press, 315 So.2d 393 (La. Ct. App. 1975); Jacron Sales Co. v. Sindorf, 276 Md. 580, 350 A.2d 688 (1976); Stone v. Essex County Newspapers, Inc., 367 Mass. 849, 330 N.E.2d 161 (1975); Madison v. Yunker, 180 Mont. 54, 589 P.2d 126 (1978); McCusker v. Valley News, 121 N.H. 258, 428 A.2d 493, cert. denied, 454 U.S. 1017 (1981); Marchiondo v. Brown, 98 N.M. 394, 649 P.2d 462 (1982); Thomas H. Maloney & Sons, Inc. v. E. W. Scripps Co., 43 Ohio App.2d 105, 334 N.E.2d 494 (1974), cert. denied, 423 U.S. 883 (1975); Martin v. Griffin Television, Inc., 549 P.2d 85 (Okla. 1976); Jones v. Sun Publishing Co., 278 S.C. 12, 292 S.E.2d 23, cert. denied, 459 U.S. 944 (1982); Memphis Publishing Co. v. Nichols, 569 S.W.2d 412 (Tenn. 1978); Foster v. Laredo Newspapers, Inc., 541 S.W.2d 809 (Tex. 1976), cert. denied, 429 U.S. 1123 (1977); Seegmiller v. KSL, Inc., 626 P.2d 968 (Utah 1981); Taskett v. King Broadcasting Co., 86 Wash.2d 439, 546 P.2d 81 (1976); Havalunch, Inc. v. Mazza, 294 S.E.2d 70 (W.Va. 1982); Denny v. Mertz, 106 Wis.2d 636, 318 N.W.2d 141, cert. denied, 459 U.S. 883 (1982).

The cases that do not discuss the issue are: Browning v. Birmingham News, 348 So.2d 455 (Ala.

(continued)

Corp., 526 F. Supp. 546 (E.D. Va. 1981); Mills v. Kingsport Times-News, 475 F. Supp. 1005 (W.D. Va. 1979). And the drafters of the Restatement responded to Gertz by adopting a negligence standard for the media defendant who defames a private person or a public person in a matter unrelated to his public capacity. Restatement (Second) of Torts § 580B (c) (1977). See generally R. Smolla, Let the Author Beware: The Rejuvenation of the American Law of Libel, 132 U.Pa.L.Rev. 1 (1983).

II. Subsidiary Issues

Because one of the present appeals involves a non-media defendant, the question arises

---

(continued from previous page)

1977); Corbett v. Register Publishing Co., 33 Conn. Supp. 4, 356 A.2d 472 (1975); Savannah News-Press Div. v. Whetsell, 149 Ga. App. 233, 254 S.E.2d 151 (1979); Bandelin v. Pietsch, 98 Idaho 337, 563 P.2d 395, cert. denied, 434 U.S. 891 (1977); Wheeler v. Green, 286 Or. 99, 593 P.2d 777 (1979); DeCarvalho v. DaSilva, 414 A.2d 806 (R.I. 1980); Colombo v. Times-Argus Ass'n, Inc., 135 Vt. 454, 380 A.2d 80 (1977); Adams v. Frontier Broadcasting Co., 555 P.2d 556 (Wyo. 1976).

whether the negligence standard is limited to media defendants, in which case the non-media defendant would remain subject to the rule of strict liability. Gertz involved a media defendant and the Court's opinion did not address the instant issue. We hold, however, as a matter of state law that the negligence standard should be applicable to media and non-media defendants alike.

The logic of such a conclusion is compelling. It would indeed be bizarre to hold as a matter of tort law that individuals are liable without fault while the medial is liable only upon a showing of negligence. See Jacron Sales Co. v. Sindorf, 276 Md. 580, 350 A.2d 688, 695 (1976). The media, being composed of professionals and capable of causing much greater damage because of wider distribution of the communication, are more cognizant of the risk of liability and more likely to take appropriate precautions. The private-individual defamer, however, whose utterance is likely to cause less harm, ordinarily will not realize the potential liability resulting from his communication and will fail to take similar precautions. See Restatement (Second) of

Torts § 580B, comment e (1977). Contra Denny v. Mertz, 106 Wis.2d 636, 659-61, 318 N.W.2d 141, 152-53 (1982). Neither policy nor reason supports different treatment of the respective types of defendants. See Jacron Sales Co., 276 Md. at 593-94, 350 A.2d at 696.

Furthermore, in Fleming I, we applied the constitutional privilege of New York Times, Butts, and Gertz to a non-media defendant where recovery of punitive damages was sought. We now take the next logical, consistent step and apply the Gertz-authorized negligence standard to non-media defendants where recovery of compensatory damages is sought.

Another subsidiary issue that arises from establishment of a negligence standard for compensatory damages is the current status of the common-law qualified privileges in Virginia. Unlike some jurisdictions, Virginia does not permit a qualified privilege to be defeated upon a showing of mere negligence. We require proof of common-law malice, that is, behavior actuated by motives of personal spite, or ill-will, independent of the occasion on which the communication was

made. Story v. Newspapers, Inc., 202 Va. 588, 590, 118 S.E.2d 668, 670 (1961). This being a more stringent standard than negligence, the qualified privileges survive in Virginia. This means, of course, that the defendant may still avoid liability based on qualified privilege even though the negligence standard is met by the plaintiff. When a qualified privilege is established and not defeated by a plaintiff's evidence of common-law malice, the negligence standard is subsumed in the higher standard and it is of no consequence that the plaintiff might have met the lower standard of negligence. Jacron Sales Co., 276 Md. at 600, 350 A.2d at 699-700.

The other subsidiary issue involves the scope of appellate review in these cases. Relying on Bose Corp. v. Consumers Union of the United States, Inc., 104 S.Ct. 1949 (1984), the media defendants assert that, in a case raising First Amendment issues, an appellate court has an obligation to make an independent examination of the entire record in order to insure that the judgment of the trial court does not constitute a forbidden intrusion on the exercise of free expression. We

agree that an appellate court in Virginia must conduct such independent examination of the whole record on the issue of punitive damages or where New York Times malice must be established, but not on the question of compensatory damages when New York Times malice need not be proven.

Bose primarily is concerned with the application of Rule 52(a), Federal Rules of Civil Procedure, which fixes a "clearly erroneous" standard for federal appellate review of findings of fact. Nevertheless, the Supreme Court in First Amendment cases arising in state courts repeatedly has held that the independent examination contended for is required on review. See, e.g., New York Times, 376 U.S. at 284-86; St. Amant, 390 U.S. at 732-33. In Bose, the Court held: "The requirement of independent appellate review reiterated in New York Times v. Sullivan is a rule of federal constitutional law." 104 S.Ct. at 1965. Consequently, because we apply the federal constitutional rule of New York Times to the punitive-damage issue in a State defamation suit, we likewise apply the federal constitutional

rule of independent appellate examination to such an issue.

Thus, we hold that an appellate court in Virginia, on the issue of punitive damages or where New York Times malice must be proven, must independently decide whether the evidence in the record on appeal is sufficient to support a finding of New York Times "actual malice" by clear and convincing proof. 104 S.Ct. at 1965. This does not mean that the reviewing court may disregard the determinations made on credibility of witnesses by the trier of fact or that the presumption of correctness that attaches to factual findings is to be discounted. Id. at 1959. The rule simply means that appellate judges in such a case must examine the facts pertinent to the punitive-damage award and exercise independent judgment to "determine whether the record establishes actual malice with convincing clarity." Id. at 1967.

In contrast, however, on the issue of compensatory damages in libel cases when New York Times malice need not be proven, we will continue to follow

the established standard of review mandated by Code § 8.01-680, that is, "the judgment of the trial court shall not be set aside unless it appears from the evidence that such judgment is plainly wrong or without evidence to support it." The reason we do not embrace Bose on this issue is that the Bose mandate of independent examination is bottomed on the obligation of reviewing judges to assure that governing federal constitutional law has been applied properly. The negligence standard for compensatory damages that we have adopted is not a matter of governing federal constitutional law; rather, within the parameters authorized by Gertz, we have fixed the standard as a matter of state law. Accordingly Bose, as well as the federal decisions on which it is based, is not controlling on this issue.

VI. Fleming v. Moore

In January of 1977, appellee W. Bedford Moore, III, sued appellant James N. Fleming for libel arising from an advertisement published a year earlier in The Cavalier Daily, a student newspaper circulated on the campus of the University of Virginia and in the Albemarle County area. Fleming was a black real estate developer and Moore was a white University professor. The dispute, and resulting publication entitled "Racism," arose from efforts by Fleming, and others, to develop land in the vicinity of Moore's home situated in the County.

Following a 1977 trial, the court below entered judgment on a jury verdict awarding Moore $10,000 compensatory damages and $100,000 punitive damages. On appeal, we reversed the judgment and remanded the case for a new trial on all issues. The 1981 Fleming I decision has been summarized in section I(C) of this opinion.

The new trial was held in October of 1982 and resulted in a jury verdict in favor of the plaintiff for $100,000 compensatory damages and $250,000 punitive damages plus 12 per cent interest on $250,000 from January 16, 1976, upon which the trial court entered judgment in June of 1983. We awarded the defendant another appeal, limited to questions concerning the standard of fault to be applied for recovery of compensatory damages, sufficiency of the evidence to support the punitive award, excessiveness of both awards, and the correctness of prejudgment interest on the punitive award. The evidence presented during the retrial differs to some degree from that produced at the first trial.

In the mid-1970s, Fleming, a County native and a successful realtor-appraiser, joined three white business associates in an effort to develop approximately 127 acres of land in the County for residential purposes. The site was within the immediate watershed of the Rivanna Reservoir, a source of drinking water. The planned unit development, called "Evergreen," was to house lower and middle-income families of both races.

Moore, a resident of the Charlottesville area since 1947, was an assistant professor in the Humanities Division of the University's School of Engineering and Applied Science. Moore lived near the development site. His residence was named "Shack Mountain" and was described as a Twentieth Century reproduction of an Eighteenth Century Jeffersonian pavilion; it was a "small version" of Monticello, not a "replica."

During a period of several years, defendant Fleming sought unsuccessfully to obtain a special permit from county authorities for use of the agriculturally zoned land. Plaintiff Moore and others opposed the development because of concern over the proposed high density (initially, 804 dwelling units were planned) and because of fear that the reservoir would be polluted.

A series of public hearings was held before the Planning Commission and the Board of Supervisors. The plaintiff and others spoke in opposition to the several plans that were submitted by the defendant. The Planning Commission staff recommended that the first Evergreen proposal be rejected mainly because the

planned density was too great. At the time, pollution of the reservoir was also of considerable concern to the planners. The Planning Commission and the Board of Supervisors rejected defendant's first proposal, mainly because of the high density projection. The second plan for Evergreen, with a lower proposed density, was likewise turned down by the County because of conservation and environmental factors relating to the reservoir. Eventually, the Board of Supervisors in early 1976 imposed a moratorium on construction within the reservoir watershed until a study in progress dealing with pollution of the reservoir could be completed. The jury has found on disputed facts that race was not a factor in any decisions made by County officials relating to Evergreen and that the plaintiff was not motivated by racial considerations in his opposition to defendant's development.

Nevertheless, as the land-use controversy developed, defendant thought that his plans were being frustrated solely on racial grounds. He noticed that white developers were obtaining approval of their plans while his were being denied. Also, he assumed that

citizen groups opposing the development were conspiring against him because he was black. In addition, the planning staff had recommended a 100-foot tree buffer to separate the developed area from the Shack Mountain property. The defendant believed that the plaintiff was a leading opponent of Evergreen and that Moore was responsible for imposition of the condition requiring the buffer. Fleming thought Moore was attempting to have the buffer placed on Fleming's property and that Moore somehow would take advantage of a racially restrictive covenant in prior deeds to the property.

Consequently, defendant drafted the publication in question. He arranged for it to appear as a paid advertisement in two January 1976 issues of The Cavalier Daily, a campus newspaper read by approximately 15,000 persons. The advertisement is copied verbatim in Fleming I, 221 Va. at 887-88 n.3, 275 S.E.2d at 634-35 n.3. It was headlined "RACISM" and "Signed: James N. Fleming."

After stating that the author had endeavored to provide pleasant housing for "working people," the item said:

> "I do not expect any Farmington members to buy my houses. The tenured position-holders who live off the public dole at the expense of the working people are already well-housed, and could not be expected to live in a racially-integrated neighborhood, anyhow.
>
> "There is a great deal of irony in the fact that here in Mr. Jefferson's country 200 years after his vision of situating his beloved Monticello upon the hilltop overlooking the developing community we have a replica of Monticello upon the hill overlooking my property which is occupied by a man who wants to deprive working people of the same opportunities that Mr. Jefferson sought for them. Mr. Jefferson even located his slaves' quarters down the hill from his house, but Bedford Moore, the occupant of little Monticello does not want any black people within his sight."

The advertisement then referred to a "great conflict"

between the "haves and the have-nots" and stated that "we have created too much financial security for the tenured segment of the economic community whose greed is repeatedly shown by their expression of 'I've got mine -- too bad about you'."

Continuing, the author wrote that he was a "lover of liberty" and could not stand by to "see the have-nots oppressed by the no-growth people who are living off of our work." He next stated:

> "I know that this Country did not achieve the highest living standard in the world by no-growth or by oppression of the working man, and yet today the opportunity to improve one's living standard is being violently opposed by the same people who oppose my proposed neighborhood.
>
> "Pollution of the reservoir is being used as the current excuse to foster no-growth. The solution, of course, is to remove the guaranteed incomes of these greedy people and put them in the position of seeing the world through the eyes of one seeking the opportunity to improve his or her living standard. Only then would

> they admit that the pollution excuse is a sham."

The advertisement concluded: "I will develop Evergreen, and a lot of people will benefit from it."

Relying on Bose Corp. v. Consumers Union of the United States, Inc., the defendant contends we should make an independent examination of all issues in this case to insure that the judgment below does not constitute a forbidden intrusion on the exercise of free expression. In addition, Fleming argues that the advertisement related to a matter of vital public concern, a land-use controversy, and that New York Times "actual malice" is the proper standard of liabiity for compensatory damages. We have addressed these issues already and no further discussion is necessary to explain our rejection of the contentions. The trial court was correct in applying a negligence standard in this case, and in using the principle in a suit against a non-media defendant.

We will consider next the question whether the award of compensatory damages is excessive. The defendant argues that the award shocks the conscience in that it bears no relationship to the loss actually sustained by Moore.

Moore read the advertisement on both days it was published. In describing the effect of the publication, Moore testified that race had no bearing on his opposition to Evergreen. Rather, he was concerned about pollution of the reservoir, preserving his privacy, and protecting the historic character of his home, which had been placed on the national and state registers of historic places. Consequently, he testified, he was "very keenly" embarrassed and humiliated by the racial attack because he had been "brought up with sort of innocence on the whole subject." He stated that the publication made him conscious of race in a way he deplored because he had been taught to be "color blind" and "considerate" in his dealings with all other persons.

Moore testified: "I was seriously upset to have a man that I disagreed with in public meetings go around behind me and put into the University student newspaper such a malicious attack on me, my character. This was done in front of my colleagues at the University, students, black and white." Describing his concern that the item had been placed in the student newspaper as opposed to some other publication, Moore said: "It was very near home and concerned me very much indeed. I felt that he had put a gap in my honor that could only be restored by vindication of my fellow citizens on this jury."

The evidence showed that during 1975 and 1976, a number of racial concerns confronted the University. The school was trying to attract minority students and faculty. Tension had developed on campus because of the University President's membership in an exclusive private club, Farmington, and there were demands that he resign his office. The plaintiff proved that publication of the advertisement in the midst of this turmoil adversely affected his teaching and his

relationship with his students of both races. Dr. Edgar F. Shannon, Jr., President of the University from 1959 to 1974, testified that the perceived racial attitudes of a professor are important to his relations with his students and materially affect the atmosphere in the classroom. Shannon indicated that he had never known Moore to do or say anything degrading to black persons or the black race.

Testimony showed that Moore was "very upset" by the publication and felt he had experienced "a terrible wrong." The evidence showed that other faculty members at the University as well as students made repeated inquiries about Moore and whether the statements in the item were true.

Summarizing the damage he suffered, Moore testified, "It's not an experience I would visit on most people. It's very unhappy." Moore said the humiliation had not lessened with the passage of time: "It still stings. I still feel my honor has been questioned, that's not something you shrug off easily."

Ordinarily, damage awards fixed by a jury following a properly conducted trial and approved by the trial judge are "held to be inviolate against disturbance by the courts." Smithey v. Refining Company, 203 Va. 142, 145, 122 S.E.2d 872, 875 (1961). But, "[a] healthy administration of justice requires that, in a proper case, the courts must take action to correct what plainly appears to be an unfair verdict. This authority is an ancient and accepted part of the common law." Id. at 146, 122 S.E.2d at 875. When there is a claim that the verdict is excessive and it appears that the award is so out of proportion to the damages sustained to suggest that it is not the product of a fair and impartial decision, it becomes the duty of the court to correct the injustice. Id., 122 S.E.2d at 875-76. This is such a case.

We agree with the defendant that the amount of the award bears no relationship to the loss actually sustained by the plaintiff. Clearly, Moore suffered damage to his reputation, embarrassment, humiliation, and mental suffering from this defamatory publication made negligently. Nevertheless, the verdict of

$100,000 is so out of proportion to the damage sustained as to be excessive as a matter of law. As the defendant points out, Moore experienced no physical manifestation of any emotional distress. Moreoever, he sought no medical attention for any condition resulting from the publication. In addition, there was no evidence that Moore's standing with his peers was diminished as the result of the libel. Indeed, the evidence shows that Moore's acquaintances supported him; one indicated that: "As far as I personally am concerned, . . . he lost nothing." Actually, the evidence showed that Moore continues to be held in high esteem among his community of friends and colleagues. Thus, we find that the amount of the verdict bears no reasonable relation to the damages sustained and, therefore, is not supported by the evidence. Hence, the trial court erred in refusing the post-trial motion to set aside the compensatory award as excessive. The court should have granted the motion and then considered requiring the plaintiff to remit a portion of the award or submit to a new trial under the provisions of Code § 8.01-383.1.

Section 6 of Article VI of the Virginia Constitution, dealing with the power of this Court upon reversal, modification, or affirmance of a judgment below, provides, in part: "In any civil case, [the Supreme Court] may enter final judgment, except that the award in a suit or action for unliquidated damages shall not be increased or diminished." We have interpreted this section: "The plain purpose of the provision is to leave to the factfinding tribunal--the jury or the trial court sitting as a jury--the function of fixing the amount of unliquidated damages. It does not deprive this court of the authority to remand the case to the lower court with direction that the plaintiff be put upon terms to remit a portion of an award for unliquidated damages or else submit to a new trial." United Construction Workers v. Laburnum, 194 Va. 872, 900, 75 S.E.2d 694, 712 (1953), aff'd, 347 U.S. 656 (1954). Upon rehearing of Bishop v. Webster, 154 Va. 771, 153 S.E. 832 (1930), the Court said that "the power long exercised by this and all other courts to put the plaintiff upon terms, and to allow him the option of waiving a portion of his damages or have a

new trial," is not affected or diminished "in the slightest degree" by the foregoing constitutional section. 154 Va. at 787, 155 S.E. at 828. For a case in which this Court diminshed a damage award, see Lorillard v. Clay, 127 Va. 734, 760, 104 S.E. 384, 392-93 (1920), decided before the 1928 enactment of the forerunner to the present constitutional provision. Acts 1928, ch. 205, p. 660.

Accordingly, we will reverse the compensatory award and remand the case with direction to the trial court to require the plaintiff to remit a substantial part of his recovery or else submit to a new trial upon the issue of damages only.

Next, the defendant contends there was insufficient evidence of actual malice to support the punitive award. We do not agree.

We have made an independent examination of the record on this issue to be certain that the judgment for punitive damages does not constitute a forbidden intrusion on the field of free expression. The trial court properly instructed the jury that the plaintiff was required to establish New York Times malice, that is,

that Moore, by clear and convincing evidence, had to prove that Fleming knew the statements were false or that he made them, according to the instruction, "so recklessly as to amount to a willful disregard for the truth. . . ."

We will assume without deciding that Fleming is correct in his position that Moore failed to prove that Fleming knew the defamatory statements were false. Nonetheless, there was substantial, credible evidence to support the jury's finding that Fleming acted with recklessness that was tantamount to a willful disregard for the truth.

On this point, Fleming argues that looking through his eyes "at his world as it existed in January 1976 . . . the only possible conclusion is that [he] was not motivated by actual malice but by genuine frustration." But evaluation of this element of proof must be from an objective standpoint, not merely from a subjective perspective.

Fleming abandoned all judgment and reason in composing and publishing the advertisement. For

example, he accused Moore of racial prejudice without possessing any objective basis for the charge. Naming Moore in the publication, Fleming demeaned him as being a tenured position-holder living off the "public dole" at the expense of working people. There was no evidence that Moore, or any other person in a similar occupation, was being supported to the prejudice of other groups of citizens. There was no proof that Fleming had any legitimate reason to believe Moore wished to deprive "working people" of any opportunity. Fleming had no proper grounds to suppose that Moore, as one of the so-called "no-growth people" was oppressing other individuals. Fleming recklessly stated that Moore's opposition to the development on pollution ground was a "sham" to conceal his supposed real purpose, i.e., oppression of black citizens and others who would live in the planned community. Finally, Fleming's act of publishing the advertisement in the student newspaper on the campus where Moore taught supports the conclusion that defendant's motive was to intimidate Moore in order to eliminate the voice of a leading opponent to Fleming's development.

Next, defendant contends the amount of the punitive award shocks the conscience in that it bears no relationship to the intended purpose of punitive damages, which is to punish the defendant for his conduct and to serve as a warning to others not to engage in similar activity. Defendant says the award of $250,000, plus interest on that amount from January 16, 1976, is unjust and establishes that the jury misconceived the law or the facts or was actuated by passion and prejudice.

The independent examination we make on the punitive-damage issue is not limited to proof of punitive liability. The First Amendment implications flowing from the amount of such an award require the reviewing court to consider the effect of approval of such an award on self-censorship in derogation of the right of free speech. Moreover, a jury verdict for punitive damages cannot be allowed to work an injustice and result in oppression. Stubbs v. Cowden, 179 Va. 190, 199, 18 S.E.2d 275, 280 (1942). Where a punitive award is substantially in excess of what ordinarily might be

expected as punishment for the particular conduct, the reviewing court has a duty to annul the award unless the circumstances are so egregious as to constitute a sufficient punishment for the wrongful activity. See id. at 200, 18 S.E.2d at 280. We hold that the amount of this award, including the interest factor, constitutes a forbidden intrusion on the exercise of free expression and that it is substantially in excess of adequate punishment for defendant's conduct.

Without question, as we have said, Fleming acted with actual malice. Nevertheless, the punishment for this excessive harangue is not merely punitive, it is destructive, even though Fleming estimated his assets at close to one million dollars. While the elements of compensatory damages differ from the requirements to establish punitive damages, many factors apply to both on appeal. For example, the absence of physical manifestation of Moore's emotional distress must be considered. The fact of no substantial reduction in Moore's standing with his associates must not be overlooked. Indeed, Moore was not charged with commission of a crime.

The amount of punitive damages awarded should bear some reasonable relationship to the actual damages sustained and to the measure of punishment required; otherwise, the award on its face indicates prejudice or partiality. Id. at 201, 18 S.E.2d at 280. This is such an award and it cannot stand.

Consistent with our disposition of the compensatory award, and on the same authority, we will reverse the punitive award, with direction to the trial court to require the plaintiff to remit a substantial part of his punitive recovery or else submit to a new trial upon the issue of damages only.

Because the main question regarding interest was not preserved properly in the trial court and because the interest issue may not arise upon remand, we do not address that question. In addition, we deny the plaintiff's motion to dismiss.

For these reasons, the judgment below will be affirmed, in part, reversed, and remanded for further proceedings consistent with this opinion.

Record No. 830758	-	Affirmed.
Record No. 830526	-	Affirmed.
Record No. 830651	-	Affirmed, in part, reversed, in part, and final judgment.
Record No. 831446	-	Affirmed, in part, reversed, in part, and remanded.

Poff, J., concurring in part and dissenting in part.

Harrison, Retired Justice, concurring in part and dissenting in part.

THE GAZETTE, INC.
v. Record No. 830758
JAMES WILLIAM HARRIS, et al.

CHARLOTTESVILLE NEWSPAPERS, INC.
v. Record No. 830526
DEBRA C. MATTHEWS

PORT PACKET CORPORATION
v. Record No. 830651
E. GREY LEWIS, et al.

JAMES N. FLEMING
v. Record No. 831446
W. BEFORD MOORE, III

Poff, J., concurring in part and dissenting in part

I do not approve the compensatory-damage standard of liability the majority imposes upon the media defendants.

The free press clause of the First Amendment was designed, not so much as a license for publishers, but as an engine of the people's right to know what the press is uniquely equipped to discover and report. The goal of the majority, which I applaud, is to strike a public-policy balance between the interest a private person has in his good name and the interest the public has in the media's freedom to publish. When a

defamatory publication causes these competing interests to collide, courts must weigh constitutional values and resolve the conflict by defining the standard of liability. Except for cases involving qualified privilege (a concept left undefined), the majority has adopted a simple-negligence standard. I fear that standard creates an impolitic imbalance between the competing interests.

The actual-malice standard weighs heavily in favor of the media defendant at the expense of the injured private plaintiff; on the other hand, the simple-negligence standard tends to chill both reportorial free press and editorial free speech, and self-censorship by a timorous media disserves the people's right to know. I would reject both standards and strike a balance midway between the two extremes.

For compensatory-damage claims, I favor a gross-negligence standard. Specifically, I would hold that, when the content of a false publication makes substantial danger to the reputation of a private person apparent, that person may recover compensatory damages against a media defendant if he proves by a

preponderance of the evidence that the defendant's negligence in the investigation and verification of the content of the publication was so gross as to shock the conscience of fair-minded men and so heedless of the truth as to evince a flagrant indifference to his rights. See Chapadeau v. Utica Observer-Dispatch, Inc., 38 N.Y.2d 196, 379 N.Y.S.2d 61, 341 N.E.2d 569 (1975).

I recognize that the courts of most states, exercising the discretion granted in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), have adopted the simple-negligence standard. We ought not fear to join the minority. This Commonwealth first proclaimed the free-press principle in 1776 in Article XII of the Virginia Declaration of Rights, and James Madison was largely responsible for inclusion of the first Amendment in the Constitution of the United States. In my view, a rule which makes publishers and broadcasters liable for simple negligence weakens Virginia's historical commitment to freedom of the press and encumbers the right of the people to learn what they need to know to govern themselves wisely.

In keeping with the standard I have defined, I will concur in part and dissent in part. In the Gazette case and in the Charlottesville Newspapers case, I must dissent from the decision to affirm the several verdicts because each was based upon an instruction defining the simple-negligence standard. For the same reason, I dissent from the decision to affirm the compensatory-damage award in the Port Packet case; however, I concur in the decision to reverse the punitive-damage award in that case because I agree that the evidence fails to show actual malice. In the Fleming case, I concur in full.

THE GAZETTE, INC.
v. Record No. 830758
JAMES WILLIAM HARRIS, et al.

CHARLOTTESVILLE NEWSPAPERS, INC.
v. Record No. 830526
DEBRA C. MATTHEWS

PORT PACKET CORPORATION
v. Record No. 830651
E. GREY LEWIS, et al.

Harrison, Retired Justice, concurring in part and dissenting in part.

The opinion of the majority finds precedential support in cases decided by this and several other state courts. I agree that in each of the cases under review the defendant failed to exercise ordinary care and therefore acted negligently. This dissent stems from my disagreement with the Court's refusal to adopt in defamation cases as a matter of state law a stricter standard than that of ordinary negligence. Ordinary care is that care which is commensurate with the occasion. It is not absolute or intrinsic. It is always relative to some circumstances of time, place, manner, or person and becomes a question of fact to be decided by a jury.

Juries are randomly selected, and the principal criteria for service thereon is not to be a felon, not under age eighteen, and not unable to communicate in the English language. Present-day juries often return verdicts that are completely out of proportion to the harm done. The verdicts under review are no exception. Trial judges are reluctant to disturb the verdict of a jury. Appellate courts are equally as reluctant to sustain a trial court when it does take such action.

I do not concur in the suggestion that a gross negligence standard be adopted. The distinction between gross and ordinary negligence is too vague and shadowy to be of any practical importance. The difficulty that courts and juries had in making this distinction in motor vehicle accident cases caused the General Assembly to abolish the gross negligence standard in guest cases. Virginia Code § 8.01-63. I have no reason to believe that a jury or a court would find it any easier to make the distinction in defamation cases.

I would adopt the New York Times standard which permits the recovery of compensatory

damages for a defamatory statement only when such statement is made with knowledge that it is false or is made with reckless disregard of whether it was false or not. And I would make the same standard applicable to the media and non-media defendants. Any lesser standard will inevitably have a chilling effect on free speech and the free press and will erode the safeguards protected by the Constitutions of the United States and Virginia.

The majority opinion does limit the application of the negligent standard by requiring a trial judge to find as a matter of law that the defamatory statement "makes substantial danger to reputation apparent." Although I approve the limitation, I fear that it will prove in practice to be one of form rather than substance. What is defamatory and when it is harmful are questions of fact. Judges will be just as hesitant to "take a case away" from the trier of the facts as they now are to set aside the verdict of a jury once it has been rendered.

Because I am of opinion that the defendants in The Gazette, Inc., Charlottesville Newspapers, Inc., and Port Packet Corporation were guilty of simple negligence only, a standard which I would not adopt, I dissent from the decision affirming the compensatory-damage awards in the cases. I concur in the action of the majority in reversing the punitive-damage award in the Port Packet case. I did not participate in Fleming.

SUPREME COURT OF VIRGINIA

JAMES N. FLEMING,

Appellant,

-against-

W. BEDFORD MOORE, III,

Appellee.

Record No. 831446

February 1, 1985

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 1st day of February, 1985.

James N. Fleming, Appellant,

against Record No. 831446
Circuit Court No. 976-L

W. Bedford Moore, III, Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of Albemarle County on the 3rd day of June, 1983.

For reasons stated in writing and filed with the record, the Court is of opinion that there is error in part in the judgment appealed from. Accordingly, the judgment is affirmed, in part, reversed, in part, and the case is remanded to the said circuit court for further proceedings consistent with the written opinion of this Court.

The Court has held that the compensatory award of $100,000 is excessive and that the punitive award of $250,000 is excessive. It follows that the award of any prejudgment interest on either the compensatory or punitive award, even if such interest on a punitive award is allowable in a proper case, merely increases the excessiveness of the awards by the amount of the interest.

Accordingly, without passing on the legality of an award of prejudgment interest on punitive damages, the Court has determined that the whole interest factor is grossly excessive and shall not be used by the trial court in computing the amount of the remittitur.

Thus the plaintiff shall remit the entire amount of the prejudgment interest, a substantial portion of the punitive award of $250,000, and a substantial portion of the compensatory award of $100,000, or else submit to a new trial upon the issue of damages only.

The appellant shall pay to the appellee the costs expended herein.

This order shall be certified to the said circuit court.

A Copy,

Teste: /s/David B. Beach
Clerk

Apellee's costs:

Attorney's fee	$50.00
Cost of printing brief not to exceed $200 - Code § 14.1-182	

Teste: /s/David B. Beach
Clerk

by the evidence produced at trial. Any remittitur that is paid to the judgments already rendered by the jury are paid to an erroneous jury verdict that as a matter of law as held by the Virginia Supreme Court was grossly excessive and it's therefore Mr. Fleming's position that the damages awarded in this case must first be based on the evidence actually produced at trial and then tested against the guidelines announced by the Virginia Supreme Court. With respect to that evidence I admit as Mr. Albro has told the Court that the advertisement

produced reaction but that is not damage. Reaction among the colleagues, reaction among the students, reaction in the community, but that is not damage. I ask the Court to look at the damage evidence produced and that damage just does not exist in the evidence produced to the Court, and with respect to the quantification of the damages, I don't pretend to tell the Court that any method I have offered this Court is exact but there is no exact method of quantifying the damage in this case. I have offered several alternatives to the Court which I hope will give the Court some guidance in awarding damages with the bottom line being that compensatory and punitive liability awards will stand. Mr. Moore's right has been vindicated but there was no evidence of actual damage and therefore an award of nominal damages would be appropriate.

THE COURT: All right, gentlemen, the Court believes that the awards in principal in this case have been approved by the Supreme Court. We also believe that if the Supreme Court had felt that nominal damages were in order, the Supreme Court would have

said so or would have entered nominal damages on its own motion. This Court has previously sustained the jury verdict in this case. The primary question before us is in the light of the evidence and in the light of the mandate of the Supreme Court what is an appropriate award and what constitutes a substantial reduction in accord with the evidence in the case. The Court believes that a reduction of one third in each award and thus in the total award is a substantial reduction and is appropriate upon an overview of the evidence in this case. We therefore submit that to plaintiff. We further submit that without any award of prejudgment interest.

MR. ALBRO: I'm sorry, I didn't hear you, Your Honor.

THE COURT: Without any award of prejudgment interest.

MR. ALBRO: Your Honor, I believe the option under the statute at this juncture is that the plaintiff either reject the Court's judgment and have a new trial on damages, accept it or accept it under protest with leave to appeal and on the record I can state on

behalf of Mr. Moore that he accepts the Court's remittitur with no protest.

THE COURT: All right, any other matter that counsel needs to take up with the Court?

MR. EDWARDS: Am I correct, Your Honor, that the final order will then be entered by this Court in written form embodying the award of today?

CIRCUIT COURT OF ALBEMARLE COUNTY, VIRGINIA

W. BEDFORD MOORE, III,

Plaintiff,

v.

JAMES N. FLEMING,

Defendant.

Law No. 976-L

May 13, 1985

VIRGINIA:

IN THE CIRCUIT COURT FOR THE
COUNTY OF ALBEMARLE

W. BEDFORD MOORE, III,	)	
	)	
Plaintiff,	)	
	)	
v.	)	LAW NO. 976L
	)	
JAMES N. FLEMING,	)	
	)	
Defendant.	)	

FINAL JUDGMENT ORDER

On April 16, 1985, came the parties, by

counsel, pursuant to the mandate of the Supreme Court of Virginia in Record Number 831446 dated February 1, 1985, in which this case was remanded to the Circuit Court of Albemarle County for further proceedings consistent with the written opinion of the Supreme Court. In that opinion, the Supreme Court of Virginia affirmed the compensatory and punitive liability of James N. Fleming ("Fleming") but reversed both damage awards as excessive. The Supreme Court of Virginia directed this Court to require W. Bedford Moore, III ("Moore") to remit a "substantial part" of his compensatory award and a "substantial part" of his punitive award, or else submit to a new trial on the issue of damages only.

For the reasons stated by this Court from the bench at the conclusion of the argument of counsel, the transcript of which hearing is hereby made a part of the record, it is ADJUDGED, ORDERED and DECREED that Moore shall submit to a new trial on the issue of damages only or shall remit one-third of the compensatory damage award of $100,000 and one-third of the punitive damage award of $250,000, resulting in a

compensatory damage award of $66,666.67 and a punitive damage award of $166,666.67. Plaintiff's request for the award of prejudgment interest on the resulting compensatory damage award is denied.

The Court having ordered remittitur of damages as noted herein, Moore, by counsel, pursuant to Virginia Code § 8.01-383.1, stated in open court that Moore accepts the remittitur and judgment of the court for the reduced sums, without protest or exception. Therefore,

It is ADJUDGED, ORDERED and DECREED, that the plaintiff, W. Bedford Moore, III, have judgment against the defendant, James N. Fleming, in accordance with the aforesaid judgment of the Court in the sum of TWO HUNDRED THIRTY THREE THOUSAND THREE HUNDRED THIRTY THREE AND 34/100 DOLLARS ($233,333.34). It is further ADJUDGED, ORDERED and DECREED that pursuant to Rule 5:9 of the Supreme Court of Virginia the transcript of the hearing of April 16, 1985 ore tenus be, and the same hereby is, made a part of the record in this case.

Fleming having indicated his intention to appeal this Final Judgment Order, and having moved the Court to suspend execution of this judgment, the Court ORDERS that execution of this judgment is suspended so long as Fleming timely prosecutes his appeals and thereafter so long as the matter is under consideration by the Supreme Court of Virginia; provided, however, that Fleming or someone for him shall file in the office of the Clerk of this Court an appeal bond approved by the Judge of this Court within thirty (30) days of the entry of this Order in the penalty of TWO HUNDRED THIRTY THREE THOUSAND DOLLARS ($233,000.00), reciting this judgment and Fleming's intention to appeal this Final Judgment Order. This Court further ORDERS that the two appeal bonds previously filed in this matter shall be released 30 days after the entry of this Order and the Clerk of this Court shall return them to counsel for Fleming.

ENTER: /s/ F. W. Harkrader,
Judge

DATE: /s/ 5/13/85

I ask for this:

/s/ Thomas E. Albro
Thomas E. Albro
Bradley B. Cavedo
Smith, Taggart, Gibson & Albro
105-109 E. High Street
Charlottesville, Virginia 22902
Counsel for plaintiff

Seen and objection noted:

/s/ W. Jeffery Edwards
D. Alan Rudlin
W. Jeffery Edwards
Hunton & Williams
P. O. Box 1535
Richmond, Virginia 23212

Gerald G. Poindexter
P. O. Box 766
Surry, Virginia 23883
Counsel for defendant

A Copy Teste:

SHELBY J. MARSHALL CLERK

By:/s/ Karen P. Shifflett, Dep. Clerk

SUPREME COURT OF VIRGINIA

JAMES N. FLEMING,

Appellant,

-against-

W. BEDFORD MOORE, III,

Appellee.

Record No. 850622

January 24, 1986

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 24th day of January, 1986.

James N. Fleming, Appellant,

against Record No. 850622
Circuit Court No. 976-L

W. Bedford Moore, III, Appellee.

From the Circuit Court of Albemarle County

Upon review of the record in this case and

consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the the judgment complained of. Accordingly, the Court refused the petition for appeal.

A Copy,

Teste:
David B. Beach, Clerk

By: /s/ Deirale Roman
Deputy Clerk

SUPREME COURT OF VIRGINIA

JAMES N. FLEMING,

Appellant,

-against-

W. BEDFORD MOORE, III,

Appellee.

Record No. 850622

March 7, 1986

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 7th day of March, 1986.

James N. Fleming, Appellant,

against Record No. 850622
Circuit Court No. 976-L

W. Bedford Moore, III, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the

appellant to set aside the judgment rendered herein on the 24th day of January, 1986, and grant a rehearing thereof, the prayer of the said petition is denied.

Justice Thomas did not participate in the decision of this case.

A Copy,

Teste:

/s/ David B. Beach
Clerk

that, Mr. Poindexter? Until we hear the evidence, or is there something in the interrogatories or the pleadings that would indicate it?

MR. POINDEXTER: Yes, sir, we believe there's ample record for the Court not to conclude that a prayer for punitive damages is not permitted in this case, given the record backdropped against the opinion of the Supreme Court. There is no way, if Mr. Moore does not intend to radically depart from the evidence that was given, that the trier of fact could find a

deliberate misconstruction of the truth or an utter wanton disregard for the truth of anything that Mr. Fleming said and that throws aside all the questions of privilege and everything else. And at some point such an absurd claim should be disposed of so that it does not clutter up whatever remains in this case. But punitive damages - punitive damages are simply not in this case.

THE COURT: Did the Supreme Court address that in anyway in its opinion?

MR. PHEMISTER: Yes, they did, Your Honor. On page ten of the opinion they talked about the punitive damage claim. I hope I'm referring you to the right page. Yes. The court said, on the basis of Gertz, we vacated an award of punitive damages entered against a publisher where the award was based upon a finding of common law malice and held that it was necessary to show knowledge of falsity or reckless disregard for the truth by clear and convincing evidence before punitive damages could be awarded. Newspaper Publishing Corp. against Burke.

THE COURT: Then it goes on to deal nonmedia defendants, which is what we have here. Since Fleming is not a media defendant and Moore is not a public figure, Gertz does not control the present case, nevertheless we share the concern expressed in Gertz at the assessment by juries of punitive damages, in holding unpredictable amounts bearing no necessary relation to the actual harm caused. Therefore, we hold that any instruction on punitive damages must be structured upon the same standard of proof of "actual malice" as defined in New York Times, applied in Gertz and followed in Burke that is required in defamation actions against media defendants. That is they're saying now that they have not previously applied it to nonmedia defendants but they're now extending the rule to nonmedia defendants so they're saying.

MR. PHEMISTER: I think in anticipation of the Supreme Court ruling, the United States Supreme Court's ruling, but they have said that the same standard applies with nonmedia defendants as media defendants, and therefore Gertz in fact does control the case. And

the other part of the motion on the punitive damage claim really ties into the motion to dismiss. You'll notice in the reference back on page ten, up at the top right before the portion of the paragraph that I was reading the Virginia Supreme Court is discussing the Gertz Case and the Virginia Supreme Court notes that the award of damages without the proof of actual injury was condemned, when they say was condemned they mean by Gertz and here they are quoting the Gertz Opinion, inviting juries to punish unpopular opinion rather than to compensate individuals for injuries sustained by the publication of a false fact. Now, if you had to crystalize the libel in this case, the contended libel on the part of the Plaintiff you would have to say that it's a claim on the part of the Plaintiff that he has been called a racist and if we take that for the purposes of our argument as the libel and boil it all down and say this is what it really means, this is what we argue to the jury that the libel was, that Mr. Fleming called Mr. Moore a racist. We submit to the court that not only is this case subject to a Motion to Dismiss it also is not a case for

punitive damages because there is no false fact. If I call you a racist it's a statement of opinion, with Your Honor's permission, and what I think is a racist may differ from what Mr. Moore thinks is a racist. He may take deep umbrage at a comment that I consider not demeaning in any shape or form and because it is an unquantifiable subjective consideration it is not a fact, it cannot be false and we contend cannot be the subject for punitive damages or for that matter libel.

THE COURT: Why wouldn't the Supreme Court then have reversed the case and entered final judgment?

MR. PHEMISTER: The minds of the Supreme Court Your Honor is something that we can only hope to...

THE COURT: Why should I do the job for them at this stage? I think I have already made that comment. They had the opportunity to reverse and enter final judgment and didn't and you are now saying this court should do it behind the Supreme Court without trying the case aren't you?

MR. PHEMISTER: No Your Honor, I wouldn't characterize my remarks that way. I think in fact the Supreme Court shows an error or ground on which to reverse it, perhaps looking for some clarification but I don't see what that clarification could be. I think the case is right at this point.

THE COURT: I am not going to require any further argument on that point. I took it up with Mr. Poindexter when this case first arrived back at - in this court and we spent a considerable amount of time and I made a ruling on that and indicated that the Supreme Court if it had chosen to could have, for whatever reasons it might have found appropriate, dismissed and entered final judgment. In fact, the dissenting opinion indicated it should have been; but it is not up to this court to do having tried it once and the Supreme Court having reversed it and sent it back for retrial. The only thing I can do is rule that it's available for retrial unless the plaintiff has in some way gotten himself in a different position since the case was sent back for retrial and not having such information I therefore overrule the

motion for dismissal and also with respect the issue of punitive damages. I don't see how the case can suddenly take a turn different from what it was when it was sent back here from the Supreme Court. I do have grave misgivings about the posture of the case when you get to that stage. I think it would have to be based on the evidence and until the evidence is actually presented to me and the court evaluates the evidence it would be inappropriate to rule on this question of punitive damages. I think a Motion to Strike would be the appropriate place for that to again be considered.

MR. POINDEXTER: Your Honor, may I just ask a question for clarification?

THE COURT: Yes sir.

MR. POINDEXTER: That is the value of Mr. Phemister's thought in this because it had kind of escaped us to the point that he introduced it. If you call somebody a thief you can prove it, you can go out possibly and get a record and show that what you said is the truth. If you say somebody has a veneral disease it's possible that you could go back and get records and

prove that; but if Mr. Fleming or I should call someone a racist there is no way that what I said could be disproved and there is no factual way that I could really prove that to the satisfaction of everybody so it becomes not a fact but a highly subjective value judgment. For example, there was an article, an editorial, in the Progress Index under the broad heading Racism in the Reservoir and it took to task Mr. Fleming and Saad El Amin who was known at that time as JeRoyd Greene for introducing, even daring to introduce the thought that someone in this area was discriminating against Mr. Fleming because he was black and it concluded by saying that perhaps the persons who make this accusation are guilty of racism or whatever. Now, I can't imagine that that kind of editorial would give rise, or would have given rise to a cause of action. Just like I could not imagine that that article that Mr. Fleming had put in the newspaper would have caused us the consternation that it has; but whether Mr. Fleming and Mr. Saad El Amin were indeed were racists was simply a perception of that editorial writer down here at the newspaper and

whether Mr. Moore is a racist, we say we never called him that, but if he insists that we have called him that so what, it is at Mr. Fleming's perception and Mr. Fleming could probably see all the evidence in the world and not be detered by it; but it cannot be proven or disproven in any objective quantification that a jury or tryor of fact can say this is it, he is not a racist, he is a racist, give him some money, don't give him some money and that is the reason that we believe that this lawsuit has simply run out of steam and it should not be allowed to linger - it has been around now for seven - six years and we are no closer to a resolution of this thing than we were six years ago and there has been the intervention of a case recently coming out of the boycotts of Mississippi, NAACP versus Claiborne which adds greater value to the value coming to our right of free speech and exchange of ideas and we just believe firmly that Mr. Fleming had a First Amendment Right to say what was said and that a court, without putting us to a jury, should put an end to this lawsuit. If Claiborne is the case that does it then Claiborne is indeed the case and

we believe that Your Honor should, despite what the Supreme Court may have said, take up the implications of the most recent decision in this area by the United States Supreme Court and rid us of the uncertainties of this lawsuit.

THE COURT: Well, are you saying that that was not presented to the Supreme Court, was not taken as an exception or one of the basis of the appeal? The term itself was one that could not lend itself to an action. What does the dissent say?

MR. POINDEXTER: Dissent is what we say.

THE COURT: Yes. Why should this court follow dissent? You are asking this court to reverse the Supreme Court and file a dissent. Sometimes we are often tempted but it's not done. It's not the law. Now, I had this question addressed in the Palumbo Case and I did considerable research, I might not have written a very long opinion but I recall the great deal of attention that was given to this question of opinion as opposed to fact. Mr. Albro, was there a written opinion from this court in that case? On the preliminary motion?

MR. ALBRO: Yes sir.

THE COURT: I may have to retreive it and look at it again but a lot of attention was given this very point that Mr. Phemister and Mr. Poindexter now raise and that is it was not a false allegation of fact but rather one of opinion, a question of mixed fact of opinion and I commented in my ruling on that very aspect of that Palumbo case, it didn't get to trial, it was settled wasn't it?

MR. ALBRO: Yes, it was settled.

THE COURT: That was a very strong point made by the attorneys for the, what was it, television station?

MR. ALBRO: Channel Six.

THE COURT: I may want to look at that but I have made my ruling and I certainly am always open to taking the second look which I will do and I note your position as to the difference between fact and opinion; but the problem that I have with it is that again we come back to this question of characterization of the terms that the Supreme Court had an ample opportunity

to deal with. Let's look at Justice Harrison's Dissent. I think we dealt with a number of cases that were not in this Commonwealth when we dealt with this question of fact and opinion; and cases from all over the country were analyzed in that context and I'll review that further and let the judge who may try the case have the benefit of that research and the memoranda on each side. It is never put to rest but I think anytime a judge enters final judgment, or what amounts to a determination of the merits of the case until the evidence is before the court, has to be based entirely on the pleadings and the answers and responses to interrogatories and I can't see how again that would be a new ingredient that would allow this court to dismiss a case at this stage which has been sent back for retrial.

MR. POINDEXTER: Your Honor, I asked Mr. Moore this morning to name some racists and he earlier named Andrew Young and he said Senator Bilbo and the late George Lincoln Rockwell. But I would think that those persons were not necessarily racists in the eyes of all persons who preceded them and that just

shows some of the difficulty that is associated with trying to quantify and talk in objective terms about a racist. Mr. Albro could be a racist to me but he may not be to Mr. Phemister and we would have our different points as to why Mr. Albro is a racist but we would never resolve that and it's unfair to try to put such a vague question to a tryor of fact and that of course gives us a problem in damages, even if we agree that this is an article which has harmed this gentleman. Another one was published in the Tribune a week before that and he was harmed by that, he said about equally; and he has filed a million dollar lawsuit based upon that. He filed a million dollar lawsuit over here, they are right across the street. Now, how does he distinguish between what harm he felt, what injury, what emotional stress, what suffering he has experienced from the Cavalier Daily article which was published twice as opposed to the Tribune article? He told us this morning that the Tribune article had an impact, probably a greater impact in the black community, among his black friends; but you can't distinguish for the jury in a certain sense

what harm the Cavalier Daily article did as opposed to the Tribune article and it has been an old teaching that when damages and injuries are so vague they cannot be ascertained you have no case.

THE COURT: Mr. Poindexter, I have made my ruling and I'll merely note this for the benefit of your objection and the record which will have to be preserved, if it's appropriate, and that is, the evidence presented had it not been for objective testimony may well have caused the court to sustain a motion to strike, had it been entirely subjective by the plaintiff your point would be well made but as I recall the evidence and certainly the plaintiff has a right to bolster his case with evidence there was objective testimony to the effect that this term used in the context of the University of Virginia Campus at the time when used was more than subjective damage. People who were in positions to testify I suppose almost as an expert and I recall specifically the former President of the University of Virginia in dealing with the position of a faculty member being termed a racist on his campus. Now, that was the

evidence. I would certainly agree with you that in the vague sense and out of the context of the surroundings that these words were uttered in you may have an entirely different result just as the old classic case, you can yell fire on the street, that 's one thing; if you yell fire in a crowded theater it's another and that's exactly what this case according to the evidence went to the jury on and I have no qualms about your position that subjective reaction is not necessarily compensible. It has to be based in objective criteria and in this case if the plaintiff doesn't provide it then he is always subject to a motion to strike, as was the other case and I think I refused to sustain a Motion to Strike based upon the fact that it was not his own reaction to it, it was the objective evaluation of his position as a faculty member at the time the utterance was made in the context of the student body and this being a student newspaper. I think I made the comment had it been published in some other publication which was not normally circulated on the campus, not primarily designed to be circulated on the campus, you certainly would have had a different

situation. I certainly made a distinction between a normal publication and that which in effect searched out the plaintiff within his own area of work. That was the basis upon which the evidence came in. I don't

CIRCUIT COURT OF ALBEMARLE COUNTY, VIRGINIA

W. BEDFORD MOORE, III,

Plaintiff,

v.

JAMES N. FLEMING,

Defendant.

Law No. 976-L

October 21-22, 1982

Transcript pages 21-23

THE COURT: All right, you may pass the list to counsel for striking.

(List submitted to counsel for strikes)

THE COURT: Ladies and gentlemen of the jury, the court says to you that the fact that you may be struck from the panel is in no way a reflection on your ability as a juror. Counsel are required to make a pre-requisite number of strikes in each case.

THE CLERK: The following six people please stand aside as I call your names and have a seat in the courtroom: Shirley Chapman, George Cleveland, Purnell Eurbanks, Lester Greenwood, David Harrison, William J. Hicks.

THE COURT: All right, if you will identify the seven remaining.

THE CLERK: Answer as I call your name: Donald Baker, Dorothy Barkley, Fannie Clark, Cole Diggs, James Glass, Mimi Hirsch and James Howe.

THE COURT: All right, any objection to the jury panel as its presently constituted from the plaintiff?

MR. ALBRO: No objections, Your Honor.

THE COURT: From the defense?

MR. POINDEXTER: May we take up a matter, Your Honor, out of the presence of the jury panel?

THE COURT: All right, I will ask the jury to step into the jury room please.

(Jury retired to the jury room at this time)

THE COURT: I will ask the members of the jury who have been excluded from the panel to step into the hall please. Do not leave, just step into the hall briefly, those of you who have been excluded from the panel.

(Rest of the jurors retired from the court-room)

MR. CARTER: If the court, please, I want the record of this trial to show that the three blacks that were on this jury, one of them disqualified himself and the other two were put off by the defendant [sic] and I want the record to show that and I want it to be very clear that the race issue in this case...he is entitled to have black people on that jury just like everybody else has and I resent the fact that they made a point, the first two were blacks, to put them off the jury and I want the record to show that's what happened and we except to it.

THE COURT: The record will so reflect. All right, you may bring in the jury.

MR. CARTER: I would move to quash the panel.

THE COURT: Motion overruled.

MR. CARTER: Thank you.

(Jury panel brought back into the courtroom at this time)

THE CLERK: Remain standing, face me and raise your right hands. You shall well and truly try the issue joined between W. Bedford Moore, III, the plaintiff, and James N. Fleming, the defendant and a true verdict give, according to the evidence, so help you God?

(All jurors indicated in the affirmative)

THE COURT: All right, please be seated. All right, you may have those jurors in the hall to come in please.

MR. POINDEXTER: Your Honor, excuse me, please, Mr. Albro has put up a board, I guess which would be a visual aid and I would ask that it not be placed before the jury at this point.

MR. ALBRO: It's an aid to the opening statement, I can take it down, Your Honor, if Mr. Poindexter feels there is something inaccurate in it.

THE COURT: Well, perhaps you should refer to your notes without the additional display at this time.

MR. ALBRO: All right.

(The remaining jurors were brought back into the...)

matter up now then.

MR. ALBRO: All right, sir, I think that is actually something that was going to be reserved for a motion to strike if that's what you want to take up at this time.

THE COURT: All right, if there's nothing else then other than the motion to strike and with the reservation of putting on evidence as to the wealth of the defendant in the event the plaintiff prevails in his

contention the Court is prepared to release the jury and hear the motion to strike if there is one.

MR. POINDEXTER: Yes sir.

THE COURT: All right, bring the jury back in. All right, ladies and gentlemen of the jury, you need not get settled back down into your seats, we're going to release you now with the request that you be back in the morning at 10:00 to resume this case. The attorneys and the court will proceed to take care of some matters which you are not needed for. So you are now excused until tomorrow morning at 10:00. Let me remind you, however, not to discuss this case or allow anyone to discuss the case with you during the time that you are recessed. You may withdraw. All right, the jury has withdrawn.

MR. POINDEXTER: May it please the court, Your Honor, first we would respectfully submit that given all the ... all the evidence heard in this case today, no case framed against the context of, framed against the decision of the court in this case previously. No case has been made out to go to the jury, because the

case includes Mr. Fleming's own recital which would rebut any suggestion of wrongdoing on his part which would give rise to the cause of action. It would seem that the plaintiff has had to show to this point at least by a preponderance of the evidence of defamation, a libel. Other than conclusionary allegations on the part of the plaintiff, first of all missing from that is the component of damages. Now, Mr. Moore has testified as have his witnesses that there was no damage. That would have to be a necessary component of his case. There is not enough in simply saying that I was distressed, simply saying that I was greatly embarrassed, that is not enough under the measure or the test provided in Fleming v. Moore to allow a jury at this point, if we did nothing else to speculate on the worth of his case. The other part of it is that we would have to insert again our right to say things, though they might have fallen unpleasant, though they might have given rise to anger on the part of Mr. Moore. Mr. Fleming has a constitutionally protected right given all those circumstances that we now know comprised the conflict

between these two men to say what he believed to be true as it concerned him at that time. If Your Honor would have had an opportunity to research some authority, I doubt whether you would have found any case with an unsettled judgment wherein the allegation was that someone was called a racist or someone suggested that that person was inflicted with race as a standard for libel. We have found no such authority. Perhaps Mr. Albro can suggest something to the court but you have to view the assertion by Mr. Fleming that the claim of race is within the context of what happened to him and how Mr. Moore was involved directly or indirectly in that occurrence. And the case has to be weighed in that light and then insert in that measurement this first amendment protection. The first amendment protection runs whether or not he is a public figure, but if he is a public figure as we submit that he must be found to be at this point, the burden becomes one of showing by clear and convincing evidence that Mr. Fleming purposely lied or was so reckless in what he said about the man until it was tantamount to a lie. And if you measure, if you take

that test and measure it against what is the evidence in this case you cannot, you cannot come to such a conclusion given the, certainly given the higher test, not even given the minimal preponderance test because what he said must be measured in a subjective rather than objective sense. If he believed what he said was true that's sufficient. Whether it was true or not, he made a mistake, he's not responsible for it. There must be some culpability. He's not punished in a libel case for negligence, he is punished for a malicious state of mind. And there's simply nothing in here to that effect. Here's a man who saw his dreams for his subdivision out there abolished in effect by what he perceived as the racist conduct of Albemarle County officials who were encouraged and abetted by citizenry all of whom suddenly rose up when he as a black person tried to initiate a development in an area where he had seen white developers develop their property, sell their property, encroach upon the reservoir and all at once he is swamped by these claims of pollution, he is swamped by a house suddenly being designated a historic landmark that's only forty

some years old despite the fact that I'm sure it is a significant piece of architecture. He is swamped by all sorts of concerns that have never before been expressed in this community. It was not unreasonable under those circumstances for him to have lashed out in the fashion that he did in the ad which was published in The Cavalier Daily on January 15th and 16th, 1976 and in order to go forward at this juncture, Your Honor, it would seem that you would have to find that there is some room for him to have told, intentionally told a falsity and that simply is not evidence in this case. Given the fact that he's testified that, believed it then, believes it today. And we submit that at this point the case should not be submitted to a jury on any grounds and, of course, that would mean that we would have to have not to respond to it beyond the response that has been elicited through the examination of these witnesses. There is no burden upon us.

THE COURT: All right, Mr. Albro.

MR. ALBRO: Thank you, Your Honor. Your Honor, I think perhaps the way to approach this issue is to consider the law and what we're going to have to ultimately instruct the jury. I state for the record only because I think it should be stated not because Your Honor doesn't know, obviously at this state all of the evidence that was admitted must be viewed in the light most favorable to the plaintiff. And all proper inferences that could be derived therefrom must similarly be so viewed and having said that the issue that confronts us now is have we made such claim as to create the jury question. Have we put on such evidence that is so as to have created a jury question on the key issues. The first issue in the case is did the defendant make the statements complained of in the advertisement. That, of course, is not denied, that's a given. The second issue is if he did, were they seen by someone other than the plaintiff. And we have had such testimony. That is not an issue. The third are the statements about the plaintiff. The plaintiff is the only living human being referred to in that ad and as we know from his testimony

and that of others there are numerous references in that ad that relate back logically and directly to the plaintiff. That's not an issue. The fourth issue, are the statements false? This is with particular reference to the charges of racist behavior and racism. Of course there is a dispute between the parties as to that, but the issue is at this juncture is the defendant entitled to strike our evidence, have we not shown falsity. We have shown falsity. We have shown falsity in two contexts. First we have shown clearly and unequivocably Bedford Moore is not in general a racist, and I'm not going to regale the court with the specifics of the testimony. But suffice it to say those who have known him intimately and well, socially and professionally recoil the notion that this man harbored any ill will against any person because of the color of his skin. It is false that he is a racist. It is false that he is an adherent of racism, both of which charges are leveled against him in the ad. Are the charges leveled against him false specifically with reference to this project. And again viewing our evidence in the light most favorable to us, the answer is

undeniably yes, we have shown they are false. He was never at any time, in any context motivated by the race of the applicant, nor was he motivated at any time in any context by the race of those persons who might possibly live in Evergreen were it ever developed. I think particularly on this issue is the testimony of Mr. Murray. Because apart from anybody else in this case Mr. Murray occupied a confidential relationship with Mr. Moore, and he was bound by a professional privilege. And at that time Mr. Moore could have said anything of any kind and expressed his true feelings about Mr. Fleming and his development, and Mr. Murray didn't even know the man was a black man until he went to the Planning Commission and found out quite by surprise that he was a black man. Although he had met with Mr. Moore once alone and once with Henderson Heyward, it never came up. The simple fact of the matter is that he has never at any time done anything with respect to this defendant or his planned development that was in any way shape or form racist or based upon an adherence to some form of racism as that has been defined or

defamatory. I think first, in the first instance that's really been taken away from us by the Supreme Court of Virginia. If they weren't defamatory they would have reversed it in their final judgment because the self same ad in every particular was a front argument when we took this case down to Richmond on appeal from the first trial. Albertus Harrison dissented, he was out voted I think five to one, and the grounds of his dissent was that it was not actual, it was not defamatory and he prevented final judgment. He stood alone. I think the Supreme Court of Virginia has ruled that it's defamatory, because if it weren't we wouldn't be here. But suffice to say we're going to have to instruct the jury on the issue nevertheless. I don't suggest we take that away from them. But that is peculiarly a jury issue. The definition of defamation is does it hold the man up to public contempt, scorn and ridicule. That is a decision that is made by the jury in the context of this community bringing to bear their common experiences and understandings of terminology as members of the community. It is simply no way that issue could be taken away at this

juncture. Did the plaintiff sustain actual injury as a result of the statements, yes, clearly he did, undeniably he did and that hasn't been controverted. Now, I must frankly confess I don't know what Mr. Poindexter is talking about when he says that the testimony is that there's no injury here. The Supreme Court of Virginia in the majority opinion in Fleming v. Moore concluded we hold, this is at 894 of the 221 Virginia opinion, we hold that Moore is entitled to recover compensatory damages upon proof of actual injury including such elements as damage to his reputation and standing in the community, embarrassment, humiliation and mental suffering. Special damages which under the common law rule must be shown as a prerequisite to recovery where the defamatory rewards are not actionable per se are not to be limited to pecuniary loss. He's testified to humilitation, embarrassment, a stain on his reputation and various other forms of mental anguish. Furthermore, we have, also had testimony that serious questions were raised about this man among people who did not know him intimately, particularly that which was raised by Mr.

Elwood. Black persons who were at the University who didn't know him who were suddenly now concerned about who this, what this individual truly thought as a member of this self same university community. Now, insofar as the allegation by the defense that if the defendant believes in what he says there is no case. That is not the law any where in any jurisdiction. Because if it were every person who was ever sued for defamation could merely walk into court, file an affidavit stating I believe what I said was true, and he'd be entitled to summary judgment. That is not the way it works. We know that insofar as compensatory damages are concerned, we have to prove that he was in some way negligent in his conduct toward this plaintiff. And I think we have shown it in the way he has conducted himself and the way in which he recklessly leveled charges of racism and racist behavior in spite of all the public record and all the evidence that was available to him. That is more than negligence, that is knowledge of falsity and/or reckless disregard for the truth and that is peculiarly a jury question and there's simply no way that we can say

at this juncture that a jury question has not been created on that issue. Now, in the Virginia Model Jury Instructions the clear and convincing evidence standard which must be shown as to knowledge of falsity and reckless disregard for the truth which is the standard for punitive damages is defined as production of evidence that simply creates in your minds, referring to the jury, a firm belief or conviction that he has proved the issue. All right, can we say on this evidence, taking it in the light most favorable to the plaintiff that we have given this jury evidence upon which it could properly reach a firm belief or a conviction that the charges of racism or a racist behavior leveled against the plaintiff by the defendant were made either with the knowledge that they were false or with a reckless disregard for whether they were true or not. And on that score there is more than ample evidence to let this case go to the jury. We know for example by his own testimony that this defendant attended every Planning Commission and Board of Supervisors meeting that occurred before January 15, 1976 on this first and second Evergreen plans. At that time

and in those meetings overwhelming evidence from a whole host of sources was introduced to show that this proposed development posed a serious threat to the life of the reservoir. Persons who had no particular interest in Mr. Fleming or race or anything else, persons who lived in the area, persons who lived outside of the area, private groups, citizen groups, individuals, the League of Women Voters, the State Department of Health, the State Bureau of Sanitary Engineering, it's all in those exhibits and it just goes on and on and on. But what is absent from all of them is evidence of racist behavior on anybody's part but what is certainly clear from that evidence is that race was used as a weapon and the jury may so conclude based on that record, it was used as a weapon by this defendant when he couldn't get what he wanted by legitimate means and the race issue was injected first and through out by the defendant and through the attorneys he employed to speak on his behalf. He had said in his ad that pollution was a sham, that it was an excuse, he said that all of these people were conspiring against him based on race from the

League of Women Voters to Delegate Murray all the way down to Bedford Moore and he has no proof of that. He is utterly without proof. Perhaps he will put on some proof that will create a doubt in the minds of the jury but it's not here now. It was not a sham, and I asked Mr. Tucker, Mr. Tucker based on your experience what scores of development in the county, in and about the reservoir and throughout the county, was this a sham, were these people in there stopping Bedford, stopping James Fleming from his race. It said it was most definitely not a sham, it was anything but a sham. There is the suggestion that because Mr. Hurt got the Ivy Farm project approved and because Mr. Wood though he never built it because he wasn't allowed to build it, got the Panorama approved, that this proved racism and somehow this relates to Bedford Moore. But what is clear from the record is that first of all both of those developments were quite distinct, they were zoned for what was going to be built there. They didn't have to go through the public hearing process that Evergreen went through. They were a different density than the case of

Evergreen. But they were certainly differently zoned. Furthermore, although the defendant takes the position that because they were approved Mr. Moore is a racist, he freely admits he never talked to Wendell Wood. He freely admits he didn't go to all the meetings on Ivy Farm, nor did he go to all the meetings on Panorama. We know that Mr. Moore when he was challenged by Mr. Puryear before the ad was published and asked where was Bedford Moore when Panorama was considered, Bedford Moore told him at a meeting that Mr. Fleming attended and his lawyer attended. He said I was right here. Sitting right in this room tending opposition but there was a difference in the zoning. And a fine difference perhaps, but not to an experienced realtor, not to a person who has all those certificates that I asked him about and all of that long experience. He knows that difference and he knew the difference and the jury may so conclude that he knew the difference between all of those. The only thing I suppose on which there is some question is the Ivy Farm issue in which he says well I did talk to Dr. Hurt and he did tell me that Mr. Moore didn't

oppose Ivy Farm. And that's supposed to give credence to his conclusion that it was all a racist conspiracy that Bedford Moore was hatching against him. But he was impeached on that point. And his prior sworn testimony was to the effect that he had never talked to ... talked to Charlie Hurt about this development. He has also told them what is a complete phoney, a complete red herring and that's the racially restricted covenant which he testified this man was also using against him. That was one of the reasons he was convinced that it was racist. This was one of the reasons he published the ad, that's a phoney, he knows about these. He knows where they are. He knows how they're indexed and it was abundantly clear that there was nothing in any of those deeds that was to be used at any time against him. Specific reference to not reimposing any of those convenants and in point of fact he testified he knew they were not enforceable. He was well aware of the effect of Shelly v. Kramer from 1947 which ruled that those things were by the boards, no longer enforceable. He said there were no other buffers, Mr. Tucker has testified there were

certainly other buffers before this buffer. So far as the origin of the buffer is concerned that perhaps is one of the bigger problems that this defendant has. Because he alleges the buffer was a brain child, children of Mr. Moore and that it was Mr. Moore's creation. And the point of fact it was not his creation. Mr. Moore was in fact surprised to learn it was added as a condition when he attended a public meeting after the staff had made it's report and put the condition in there. And he attended that meeting, we know he attended that meeting. The Planning Staff report was read to him at that meeting in which, in great detail. Mr. Tucker read why the buffer had been proposed, where it came from and what it's purpose was. He knew that, and the jury may so conclude that he knew that. Never once did Bedford Moore utter a single thing or do a single thing that indicated racial anomalous toward this plainiff. We also know relating back to this buffer and historic landmark designation that he knew perfectly well this historic preservation was not a sham as he alleges. And that was one of the reasons he put the ad in, because he knew it

was a sham, it was really because of racist behavior, racist conspiracy. And the jury may certainly disregard all of that. Finally, The Cavalier Daily, what can the jury conclude about that? We know that this defendant was upset with The Daily Progress because it had mislead it's readers. And he said so I went to The Cavalier Daily. Now, he claims he didn't know Mr. Moore taught there but he was impeached on that. But he certainly testified he knew Mr. Moore worked at the University. And he went into The Cavalier Daily, a paper whose circulation was unknown to him by his own testimony, didn't know who read it and he put his ad in there. He put his ad in there at a very peculiar juncture in the history of the county and it's supervisors and the collection. And I think the jury may safely conclude one of the reasons why he didn't go back to create misconceptions in the minds of the readers of The Daily Progress was that he was not seeking to set the record straight. He went after a tenured professor at the University of Virginia because he knew where he lived and he could do some damage there. He knew all about tenure. And if

you read that ad straight through there is no question that the only living person named in that ad is referred to throughout the ad. I go through that, perhaps it wasn't all necessary but suffice it to say Your Honor, at this juncture there is no question but that the jury can come back on every single issue that is our burden and conclude in our favor and they may find by further conviction or belief that the leveled charges of racism and racist behavior were known to be false by this defendant or and it is in the disjunctive or were published with a reckless disregard for the truth. And therefore it would be inappropriate at this time to sustain a motion to strike. I reserve argument if we're going to have argument on whether Mr. Moore has now become a public figure in spite of the fact the Supreme Court of Virginia said he wasn't. I don't know when you want to take that up. I would suggest to the court in light of the hour and the issue that that is something that should only concern us at the time of jury instructions. It really isn't something we have to take up right now. I think we ought to limit ourselves to the other issues that relate to our burden of proof. Thank you.

THE COURT: All right, anything further Mr. Poindexter?

MR. POINDEXTER: No, no sir.

THE COURT: The Court has reviewed the evidence as we've received it carefully and taking into view the elements necessary to be proved for a plaintiff's verdict and the degrees of proof required we believe that there is sufficient evidence on each element to the degree required for the jury to be able to make a finding for the plaintiff. We consequently overrule the motion to strike. Now, I believe that's about all we can do this evening gentlemen, so we will reconvene tomorrow morning at 10:00.

MR. ALBRO: Your Honor, would I be correct in understanding then that my first order of business ...

THE COURT: Your first order of business would be to put on your evidence ...

MR. ALBRO: ... is to put on his wealth?

. . .

back if you'll remain outside and not come back into the court room until the Bailiff admits you.

JURY IN RECESS.

THE COURT: All right, has counsel had an opportunity to compare instructions yet?

MR. ALBRO: No, sir, we've got a set.

THE COURT: I'll give you about ten minutes to compare instructions and that may enable us to direct our attention to the areas of difference.

MR. POINDEXTER: Yes, sir, could we as a prerequisite could we start with a motion to strike?

THE COURT: Yes, I'll be glad to hear your motion. You may proceed with your motion.

MR. POINDEXTER: Yes, sir. Your Honor, first we have to start way up here with the libel or defamation. That can only be accomplished through an intent to use language or word that hurts someone with a knowledge that what you have said is false or you utterly disregard the facts as you know them to be or as they could be ascertained and you say so. Then in this case that certainly cannot be shown to exist. Whether what

Mr. Fleming said was true or not, there is absolutely no showing, noth.... nothing indicates, not one scintilla of evidence to show that he made a false charge given all of the circumstances as they existed then, or that he recklessly made an accusation of any kind against Mr. Moore or anybody else. Now he says, and it goes undisputed, that he was the first black person in the history of Albemarle County to undertake a development of any consequence, and there is ample testimony to show that he was turned down on two occasions and had unusual and weird, contorted restrictions and conditions imposed upon him throughout this process, and while all along around him, before and after, white property owners, white developers, were one way or another accomplishing what it was that they wanted to accomplish around the reservoir in the terms of commercial development. Now given those circumstances alone, he could conclude that I am, in his own mind, a victim of racial discrimination. I am black, I'm the only one attempting this, I'm the only that's ever attempted this, I'm the only one who is being frustrated in my attempts to develop, I

have met all the conditions as I know them to exist in the county to initiate this development and they keep turning me down. Was he turned down by people who were not suspect, were there any black people involved in this process? No. All of the persons to whom he had to go have been identified through the testimony of the witness that appeared before the court were white people with the possible exception of one Planning Commission member, who it was that Mr. Fisher couldn't even remember his name. So his involvement in all of this may, must not have been terribly effective or important. We don't even know what time frame this man served on the Albemarle County Planning Commission. Then he initiates a lawsuit in Federal Court, he makes his claim, says I am being discriminated against, I am being denied constitutional rights, due process, etc., they go to trial four days; the judge says listen, this is what we can reasonably infer, listen, what in the world has happened to this man? Give him his 2.5 unit density per acre. The Board is stampeded in front of Judge Turk, they run back, they go to a public hearing and give

the man, after all these years, they give him 2.5 units per acre density. Chairman of the Board of Supervisors the next day gets up and says, ho....in fact a hollow victory, we ain't giving him nothing, we've still got a moratorium out there, he'll never develop anything, goes in the court, volunteers to, voluntarily attempts to overturn the settlement by aiding the intervenors, has the same attorney to create the intervention process that had....representing him and his wife, Mr. Moore, from representing Mr. and Mrs. Bedford Moore on one day to representing the two intervening bodies on the next, all in an effort to stop Evergreen.

Now what could Mr. Fleming logically conclude from all this? All this increased concern about beautification of the reservior. Surely it had been of some concern in 1972, 1971, '69, for as long as Ivy Creek has drained into that man-made water shelter out there, it's been of some concern that one day because of pollution, run-off, chemical plants, of the Acme Visible Records, Morton plant, all drain right into this body of water and one day you'd have a problem. Everything

came forth when Jim Fleming, black developer, announces his plans to create a subdivision out there. Everything converged. All at once a 37 year old house is designated a historical site, not only in Virginia, but on the Federal register. Overnight these things occurred within months of each other. Increased concern. There are four studies commissioned of the reservoir within the context of this application, when this application is pending before officials here in Albemarle County. He is called a racist in 1975 by the newspaper because he raised the issue. The stage is set, racism. That's an exhibit in the case. Mr. Green from Richmond, Mr. Fleming from up here, they run around calling people racists, they're racists. All right. Mr. Fleming didn't sue the newspaper, I guess under the law that we know it to be. He could have, but it didn't even occur to him that he had a cause of action against a newspaper because it made a comment about him in the midst of a public controversy, a controversy of great interest in this community. Does he have a right to say anything in return? I mean, do we have a First Amendment or do

we not? So he says, after all of this has fallen upon him, racism, I've been trying now for three or four years to effect a housing development out there, I am frustrated, these people are stopping me, they claim it's pollution, they claim it's eutrophication, they claim whatever it is, but I know what it is. I am black, I am being discriminated against; and he was vindicated four months later by the court urged settlement. He talked about things as he perceived them. Where is the attention... where did his attention focus? It focused on the one man who was closest in his mind to all of this, the man sitting right over there. Now to rule in our favor in, on this point is not to chastise Mr. Moore, it well could be that Mr. Fleming was wrong about Mr. Moore, but that's not the issue. Did he have a right to believe that Mr. Moore was one of the....let's put it this way, ring leaders, ring leaders of this ongoing effort to deprive him of his right that he thought he had as a citizen of this country to develop property that belonged to him. Mr. Moore said in testimony, well, Mr. Fleming didn't conform to what I wanted him to conform to. He should....I was willing to

dedicate my life to the public trust, Mr. Fleming was not, I thought he should have. Mr. Moore we submit has, has become by any stretch of any case that's significant, Your Honor, a public figure just as much as Mr. Fleming had become a public figure and we would concede that indeed at that time in this place he was a public figure, if not for any other reason, the paper and its attention upon him and what he was doing caused him to be a public figure.

Now does he not have a right, given the money he's spending out there, his ownership of property which he cannot do what he thinks that he has a right to do with, can he not as a free American citizen protected by our Constitution, protected by the First Amendment, protected by even something closer to us, a common law sense of privilege that a man can say something about something he owns or has a pecuniary interest or a social interest or a political interest in, can a man under those circumstances, a man can say something to people that he believes would have at least some interest in the...(inaudible). So what did he do?

He said, I'm not getting a fair shake in the Progress index. Every....they've already called me racist; the reporting seems biased, I am going to an audience where I might get some attention, where I might get some sympathy. That old...the editor then, obviously he's opposed, he's not in favor of me and he goes through...we can assume that he went through his files, he pulls out the editorial where he'd been called a racist. He says, I've got to get my message through. I want to comment my way on this controversy that affects me, not only me, these are public officials making these decisions. These are, these are tax exempt organizations, these are public...the league, League of Women's Voters, the different State agencies. I have a right to strike back, to talk back, and he does it. He goes up to the University of Virginia, he knows there's a paper up there that's widely read, probably more widely read in a certain liberal, so-called liberal segment of this community than in other parts of the community, and he addresses that community. He says, this is what's happening to me here in the shadow of Monticello; this is what's

happening to my dream, just like Jefferson had a dream, he invokes Jefferson as Judge....Justice Harrison said, he compared Mr. Moore with Mr. Jefferson; Mr. Moore came out on the short end and there's nothing wrong with that. He had a right to say these things. He says this, not only does he go to the paper, The Cavalier Daily, but he also goes to the black community. He has friends in the black community; he wants to articulate to the readership of the black community at the same time what's happening to me, Jim Fleming, and he tells them. Now, Your Honor, given all those circumstances, adjust it against the fact that we have no damages. What's he going to tell the jury that all this is worth? Is there any mention, any money been mentioned, any expert testimony as to what all...how you compute this in dollar value, what this man's embarrassment, which he may have suffered, humiliation, he may have suffered. Does that mean he's entitled to money? There are things said about all of us at different times by different people. It may have been said about Your Honor at some time or another when you turned your back on that jury

decision down in Goochland. May have been all kinds of things said about you. That's unprecedented in this state. People have a right to say it. It may have hurt you, because I know, you know, the background from which you operated when you did that. But there are all kinds of things said in media and by people about other people and we get offended. Things have been said about me, Mr. Carter, Mr. Albro I'm sure, maybe even the Clerk of the Court, but that does not mean that we can use something that simply offends us or makes us feel embarrassed to cut off the right of another citizen, to speak freely about matters that affect him or her. Your Honor, there ain't nothing in this case. You know, we've been trying to tell them that since 1977, there is nothing in this case, and now that we've heard it all, put it to rest at this point. Do what you should do as a judge, apply the law, let this man go, don't impose it upon those citizens. You know, if they'd made out a factual dispute, juxtaposition of facts of one against the other, there would be something to give to him, but it is your obligation now and you were thrust into this at a

rather late date, and I would suppose that even as diligent as you are, you have not read all the law that may apply and Tom Albro and I have been working on it a long time and I'm sure we haven't read all the law that applies in this situation, but Your Honor, you should know enough about it now to do what should have been done a long time ago and dismiss this case and not leave it to those people who have no particular responsibility. There's no, there are no facts in dispute, there's nothing. Now this is framed against the fact that if you play around with the burden of proof, we find out that all this should have been, to make anything significant out of this, you got to do it not by the usual standard, preponderance, we're not even talking about that, clear and convincing. I don't know what it means to me, but I guess it means something to you as a judge, one of the cases said that it was intermediate evidence, somewhere between proof beyond a reasonable doubt that applies in criminal cases, I never knew what that meant, and a preponderance of the evidence that applies in the usual civil case. This is a special case, special, special burden

to get some money. When you start talking about infringing upon a man's right to say something, they haven't done it. And we would submit Mr. Moore, public person, man at the University, I'm just a modest little professor. Mr. Shannon comes in and says, this man is the official meeter and greeter, known all over campus, the first man that the visitors, the dignitaries at the University meet, and he greets them, makes them feel good, gets them housed and then brings them to me, he's a special man at the University. Not only that, special man out here in the community, living in a castle on the mountain, a replica of Monticello, house on the National Register of Historic Places, or about to be put on it, federal acknowledgment of the, the home, a leader in the opposition against Evergreen, the only man that we have ascertained from all of this who hired lawyers to come down and speak for him. With that, again the burden is that he must show, as he cannot, that Jim Fleming lied about him or so disregarded his role in all of this until it was just like being a lie. And that doesn't mean make mistake about it. That simply means that Jim lied, or

misconstrued everything he did to such a reckless, utter disregard for this man that it was just like a lie. Your Honor, it's just simply not here and this is the juncture to put it to rest. This is the last....could be the last litigation surrounding this mess out on the reservoir that involves this man. It should be ended today, now, should not be put to the jury, it should be taken up by you and cut off right now, because there is no case. Thank you.

THE COURT: Mr. Poindexter, in reviewing the evidence in this case, there may be evidence to sustain your characterization of the case, but as we ruled yesterday evening, we also believe that there is evidence which sustains the characterization of the case made by the plaintiff, therefore we think it is a jury question. As to the matter of damages, the Supreme Court addressed that in its decision saying that you were not limited to out-of-pocket, monetary considerations, the jury can place a value on other damages which are set out in that opinion. Consequently, we must again overrule your motion to strike.

MR. POINDEXTER: Your Honor, is that to the punitive damages? Are, are we still at that level of proof? Have they shown that after you value all the evidence, or do they just get a shot at compensatory damages?

THE COURT: Oh, if the....perhaps we can go into that in the instructions, but if they find compensatory damages, which can be damages to the man's form of embarrassment and that sort of thing, then the punitive damages can be based on those compensatory damages.

MR. POINDEXTER: But only upon a higher showing of proof. That, that's....there are two....we're right now we're faced with a, a case that rises here to....

CIRCUIT COURT OF ALBEMARLE COUNTY, VIRGINIA

W. BEDFORD MOORE, III,

Plaintiff,

v.

JAMES N. FLEMING,

Defendant.

Law No. 976-L

November 19, 1982

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF ALBE

W. BEDFORD MOORE, III,	)	
	)	
Plaintiff,	)	
	)	
v.	)	LAW NO. 976L
	)	
JAMES N. FLEMING,	)	
	)	
Defendant.	)	

MOTION BY JAMES N. FLEMING TO SET ASIDE VERDICT AND ENTER JUDGMENT FOR FLEMING OR, IN THE ALTERNATIVE, FOR A NEW TRIAL

James N. Fleming (Fleming), by counsel,

respectfully moves the Court for an Order setting aside the verdict returned by the jury on October 22, 1982 and entering final judgment for Fleming or, in the alternative, granting Fleming a new trial. In support of this Motion, Fleming states:

(1) The jury was improperly and erroneously instructed on numerous material issues of law, including the following:

(a) The Court failed to instruct the jury that Fleming was protected by a qualified privilege arising because the alleged libel concerned a matter in which Fleming had a direct personal and pecuniary interest.

(b) The Court failed to instruct the jury that Moore was a public figure and that Fleming could be held liable only in a showing that the alleged libel was made with knowledge of its falsity or reckless disregard of the truth.

(c) The Court failed to instruct the jury that Fleming was protected by a qualified privilege to make fair comment on matters of public concern.

(d) The Court erroneously instructed the jury that Moore could establish liability under a negligence standard rather than the actual malice standard required by Sanders v. Times World Corp., 213 Va. 369, 192 S.E.2d 754 (1972).

(e) The Court failed to limit the jury's award of prejudgment interest to the legal rate of 6%.

(2) The jury's verdict was against the overwhelming weight of the evidence for the following reasons:

(a) Moore failed to provide competent proof of actual injury as required by the Supreme Court of Virginia in Fleming v. Moore, 212 Va. 884 (1981).

(b) Moore failed to provide competent evidence of actual damages.

(c) Moore failed to provide evidence on which a reasonable man could conclude that the alleged libelous statements were made with actual malice, as he was required to do in order to establish liability or to recover punitive damages.

(3) The jury's verdict of $100,000 in compensatory damages and $300,000 in punitive damages plus interest at 12% from January 16, 1976 is so excessive as to shock the conscience and clearly indicates that the jury was influenced by passion, corruption or prejudice or that it misconceived and misunderstood the facts or the law. Moreoever, the award is so out of proportion to the injuries suffered that it is clearly not the product of a fair and impartial decision.

(4) Fleming's fundamental due process rights under the United States Constitution were violated because no black person served on the jury.

Fleming relies in support of this Motion on the record in this case, the trial transcript, and the Memorandum By James N. Fleming In Opposition To Motion To Strike Affidavit of Substantial Defense filed contemporaneously with this Motion. Fleming respectfully requests the opportunity for oral argument in support of this Motion.

JAMES N. FLEMING

By/s/John Charles Thomas
Counsel

John Charles Thomas
L. B. Cann, III
HUNTON & WILLIAMS
P. O. Box 1535
Richmond, Virginia 23212

Of Counsel

CERTIFICATE OF SERVICE

I certify that on the 19th day of November, 1982, a copy of the foregoing MOTION BY JAMES N. FLEMING TO SET ASIDE VERDICT AND ENTER JUDGMENT FOR FLEMING OR, IN THE ALTERNATIVE, FOR A NEW TRIAL was hand-delivered to Thomas E. Albro, Esq., Smith, Taggart, Gibson, Suddon and Albro, P. O. Box 1585, Charlottesville, Virginia 22901, counsel for plaintiff.

By: /s/John Charles Thomas
John Charles Thomas

(Paid Advertisement)

RACISM

I have endeavored to realize the opportunity to provide housing and pleasant surroundings for working people--the sort of people who made this the great country that it is.

I do not expect any Farmington members to buy my houses. The tenured position-holders who live off the public dole at the expense of the working people are already well-housed, and could not be expected to live in a racially-integrated neighborhood, anyhow.

There is a great deal of irony in the fact that here in Mr. Jefferson's country 200 years after his vision of situating his beloved Monticello upon the hilltop overlooking the developing community we have a replica of Monticello upon the hill overlooking my property which is occupied by a man who wants to deprive working people of the same opportunities that Mr. Jefferson sought for them. Mr. Jefferson even located his slaves' quarters down the hill from his house, but

Bedford Moore, the occupant of little Monticello does not want any black people within his sight.

There is a great conflict waging between the haves and the have-nots. Obviously we have created too much financial security for the tenured segment of the economic community whose greed is repeatedly shown by their expression of "I've got mine--too bad about you."

I am a lover of liberty and freedom of opportunity. I cannot stand by and see the have-nots oppressed by the no-growth people who are living off of our work. I know that this Country did not achieve the highest living standard in the world by no-growth or by oppression of the working man, and yet today the opportunity to improve one's living standard is being violently opposed by the same people who oppose my proposed neighborhood.

Pollution of the reservoir is being used as the current excuse to foster no-growth. The solution, of course, is to remove the guaranteed incomes of these greedy people and put them in the position of seeing the

world through the eyes of one seeking the opportunity to improve his or her living standard. Only then would they admit that the pollution excuse is a sham.

I will develop Evergreen, and a lot of people will benefit from it.

SIGNED: JAMES N. FLEMING

CIRCUIT COURT OF ALBEMARLE COUNTY, VIRGINIA

W. BEDFORD MOORE, III,

Plaintiff,

v.

JAMES N. FLEMING,

Defendant.

Law No. 976-L

October, 1982

VIRGINIA:

IN THE CIRCUIT COURT FOR
THE COUNTY OF ALBEMARLE

W. BEDFORD MOORE, III — Plaintiff

vs.

JAMES N. FLEMING — Defendant

MOTION TO DISMISS

COMES NOW the defendant, James N. Fleming, by counsel, whereupon he moves the court to dismiss the action now pending against him upon the grounds that:

1. The publication referred to in plaintiff is [sic] motion for judgment and amended motion for judgment which gives rise to his alleged claim against the defendant's protected speech pursuant to the First Amendment of the United States Constitution and cannot give rise to a cause of action whether or not it occasioned the plaintiff harm or damages and

2. Because the speech referred it is privileged speech, i.e., at the time of its publication a privilege extended to the defendant to talk about his own affairs and the affairs of government in a robust and hardy manner.

3. Because to suggest that someone is a "racist" or that someone has acted towards another out of "racism" is not actionable in law because the terms are subjective and cannot be quantified in an objective sense; and

4. Because the defendant was justified in his utterance and the record in this case show no reckless or wanton disregard for the truth of what was said.

RESPECTFULLY,

JAMES N. FLEMING

BY /s/
Counsel

Gerald G. Poindexter
Poindexter & Poindexter
P. O. Box 766
Surry, Virginia 23883

Charles E. Carter, Esquire
C/O NAACP
186 Remsen Street
Brooklyn, New York 11201

CERTIFICATE

I hereby certify that a true and correct [sic] of this Motion was hand delivered to the law office of Thomas Albro, Esquire, located in Charlottesville, Virginia 22901 on this day of October, 1982.

/s/

IN THE CIRCUIT COURT OF
ALBEMARLE COUNTY, VIRGINIA

W. BEDFORD MOORE, III,

Plaintiff,

v.

JAMES N. FLEMING,

Defendant.

Law No. 976-L

November 19, 1982

MEMORANDUM IN SUPPORT OF MOTION TO SET ASIDE VERDICT OR FOR NEW TRIAL

Pages 14-25; 44-47; 57-59; 63-68

166 Va. at 468. In short, where a qualified privilege exists the only proper inquiry is whether the words were stated with actual malice. In Peoples, the Supreme Court reversed a judgment in favor of plaintiff on the ground that there was no evidence sufficient to overcome the effect of the qualified privilege.

Obviously, no consideration was given to any of these matters during the trial of this case because the Court never made the legal ruling that it

should have made, that is, that this is a case where there exists a qualified privilege. See, Peoples Life Ins. Co. v. Talley, 166 Va. 464 (1936); Marsh, v. Commercial and Savings Bank of Winchester, Virginia, 265 F.Supp. 614 (W.D. Va. 1967). Clearly, the jury should have been told in no uncertain terms that Fleming, because of his interest in the subject matter, had a qualified privilege to make the statements contained in his ad.

3. A Qualified Privilege Adheres Because Moore is a Public Figure

The Court ruled as a matter of law that Moore was not a public figure within the context of this case. Tr. at 539. The Court did not set forth the facts which it considered in making that determination. It simply said that it found no evidence to establish that Moore was "other than a private person." Tr. at 539. Fleming submits that there is ample evidence on that subject and that it compels the conclusion that for purposes of this case Moore was a public figure.

First, Fleming I cannot and does not control the resolution of this question because the evidence here differs from the evidence considered by the Supreme Court. The Supreme Court's finding in Fleming I that Moore was not a public figure is based on the following facts:

1. that Moore's only public involvement consisted of speaking twice in public hearings concerning "Evergreen;"

2. that Moore sought only "to protect the value of his own residence;"

3. that Moore never discussed the "Evergreen" proposal with the media;

4. that Moore did not attempt to organize or lead opposition to "Evergreen;" and

5. that Moore's involvement at the public hearings "was in his capacity as an adjoining private landowner whose property might be affected by the proposed development."

Fleming I, 221 Va. at 891-892. The facts in the second

trail were vastly different. The only fact that did not change between the first trial and this trial is that Moore did not discuss "Evergreen" with the media. On every other point, there is either additional or different evidence that requires this Court to conclude that Moore was a public figure for purposes of this case.

In deciding whether or not Moore was a public figure, the Court should have considered the following evidence:

1. Moore admitted that he "spoke at two of those meetings," referring to meetings of the Planning Commission and Board of Supervisors. Tr. at 72. He said, "In January of '75 of the first plan I spoke before the Planning Commission in the Courthouse and then in January of--also the same month, a little later, I spoke before the Planning Commission, those two times." Tr. at 72. He clearly suggests that he spoke only twice but later he contradicts himself. See items 5, 11, and 15 below in this list.

2. Moore said he did not organize any efforts against Evergreen but "simply opposed it on" his "own account." Tr. at

73. Yet, another testimony in his case contradicted that statement. See items 8, 10, and 13 below in this list.

3. Moore denied being an officer or director of any group opposed to Evergreen. Tr. at 73.

4. Moore denied giving any newspaper interviews about Shack Mountain or Evergreen. Tr. at 73-74.

5. Moore spoke at a Board of Supervisors meeting in August 1975 regarding a moratorium on development at the reservior. Tr. at 79, According to Moore he "was speaking out for and urging that conservation zoning be put in this new planning the whole way around the reservoir to protect it. . . ." Tr. at 80.

6. Moore admits that when Evergreen II was proposed in November 1975 that he, Moore, "continued to oppose it." Tr. at 81.

7. Moore denied being a party to a suit to set aside a consent decree that had been reached in federal court concerning the Evergreen development. Tr. at 88. However, as other evidence established, Moore was in fact involved in that

suit though not as a party. See item 8 below.

8. Moore admitted on cross-examination that he was a member of one of the two organizations that sued to intervene in the federal court action so as to overturn the consent decree. He also admitted that his wife was a member of the other intervening organization. Tr. at 106.

9. On cross-examination, Moore admitted that after he was unable to secure a strip of land from Fleming that would have lain between the two properties he, Moore, "reported failure back to the Supervisors the following Monday and then they voted to impose that restriction. . .with their permit." Tr. at 106-107. The restriction referred to was the tree buffer. Tr. at 107.

10. Though Moore testified on direct examination that his opposition to Evergreen had been simply on is own account, on both direct and cross-examination he read from Exhibit 4 the following language:

"I could not negotiate with you gentlemen in good faith and then turn around and

oppose your project in the public hearing, as I feel I must do for the good of my neighbors and for the County as a whole." Tr. at 67, 147.

11. Moore, on redirect examination, recounts a Planning Commission meeting on November 17, 1975, which he attended. This meeting concerned the development of Panorama Farms, another development on the reservoir. He said he sat silently at that because he and the others present were not allowed to speak. However, he goes on to describe a subsequent Planning Commission meeting where Fleming was present and a Mr. Puryear asked the rhetorical question of "where was Bedford Moore on November the 17th" questioning in effect why Moore had not spoken out against Wendell Wood's development. Moore then testified to what he did in response to that rhetorical question:

"[F]inally I got sort of annoyed and I said, I burst out and I said I was here, right in this room on November 17th, to Mr. Puryear's implication, he was saying Mr. Wendell Wood on November 17th was getting his development advanced." Tr. at 157.

12. James B. Murray, formerly Moore's attorney, testified on Moore's behalf. He was asked why Moore wrote Exhibit 4, the November 1974 letter, Murray testified as follows:

"He became concerned in our conversations that his efforts to solve a personal problem on his [that is, purchasing land from Fleming to increase his road frontage at his entrance] might jeopardize a common effort that he and all of his neighbors were about to undertake to oppose the development as a whole, and in essence said to me do you think, don't you think it's wise that I forego what I personally want for what is good for the whole neighborhood." Tr. at 262.

13. On cross-examination Murray went so far as to admit Moore's leadership role in the opposition to Evergreen.

"Q. Mr. Murray, was, could Mr. Moore have been characterized as a leader of the opposition against Evergreen?

A. He and four or five half dozen other people, yes." Tr. at 289.

14. Further, again on cross-examination, Murray gave additional testimony that shows Moore's public role in these events.

"Q. So, Mr. Moore as a result of all this, became identified in the public eye as one of the opponents of Evergreen is that correct?

A. I don't think the public knew about it. Perhaps people that attended those meetings might have seen him. But his name in a public sense might have appeared in the newspaper once or twice in three years." Tr. at 289.

15. Mr. Robert W. Tucker was called as a witness on behalf of Moore. On direct examination in plaintiff's own case Tucker testified as follows regarding Moore's speaking out in certain hearings on December 2, 1974 and January 7, 1975 concerning Evergreen I:

"Q. All right, sir. Now, have you known in the course of your dealings with the planning staff, had you known of Bedford Moore speaking out on conservation issues before as they affected the reservoir?

A. Yes, sir, I recall Mr. Moore speaking certainly at public hearings on the, at that time there was a comprehensive rezoning ordinance being reviewed by the county. Public hearings were being held throughout the county, and I remember Mr. Moore speaking at those meetings, questioning conservation zoning around the reservoir."

Tr. at 300.

16. On cross-examination Tucker repeated that he has heard Moore speak at public hearings in opposition to Evergareen:

"Q. [N]ow, do you recall Mr. Moore's attendance at Evergreen hearings?

A. Yes, sir, I believe he was those hearings.

Q. Did you see him get up at any time to make his position known?

A. I believe that he did that. If he didn't, I believe he had an attorney representing him to speak for him.

Tr. at 333.

All of the foregoing testimony was adduced in Moore's case. It establishes, by virtually any measure, that Moore was not a mere private citizen who was seeking the vindication of private rights. In fact Moore was actively involved in a public way in opposition to development along or near the reservoir. There should be no wonder, on these facts, of how Fleming came to recognize Moore as a public adversary. Indeed, the single most telling piece of evidence regarding Moore's status as a public figure came out of Moore's own mouth when he admitted that he engaged in "public" disagreement with Fleming. When Moore was asked his reaction to the ad he said that he

> "Was seriously upset to have a man that I disagreed with in public meetings go around behind me and put into the University student newspaper such a malicious attack on me, my character."

Tr. at 89. In light of the testimony set forth here in detail this Court can see upon the cold record that Moore was in fact a public figure regarding developments at or near the reservoir. It is plain that the Court must

reverse itself and declare Moore a public figure. Yet that requires that the present verdict be set aside.

The furtherest [sic] advanced salient with respect to one's status as a public figure is Time, Inc. v. Firestone, 424 U.S. 448 (1976). That case concerned a libel suit filed by Mary Firestone against Time Magazine which had published an article saying that her husband had secured a divorce on the grounds that Mary Firestone had committed adultery. The statement was shown to be untrue. Time argued that Mary Firestone was a public figure and that she should not be allowed to prevail absent a showing of actual malice. The Court rejected Time's argument.

First, the Court set forth a portion of the now familiar test for a public figure:

> "For the most part those who attain this status have assumed roles of especial prominence in the a affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."

424 U.S. at 453, quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974). (It should be noted, however, that the foregoing quotation from Gertz is not the complete statement of the public figure test. The complete statement is this:

> More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions.

418 U.S. at 351. Thus, the full formulation of the rule makes clear that one can become a public figure either by thrusting himself into the fray or being drawn into that fray.)

Next, the Firestone court reviewed the facts. Its analysis is helpful with respect to the instant action because it shows the sharp contrast between Mary Firestone's conduct and that of Moore's. The Court said that an attempt to dissolve a marriage is not a public controversy as referred to in Gertz. On the other hand, an attempt to hinder development along a

reservior surely is a public controversy where one group of citizens seeks development and another opposes it. Further, in Firestone, the Court was influenced by the fact that in order to get a divorce, a court proceeding had to be filed; there was no other choice. Here, by contrast, there was nothing that required Moore to testify at public hearings, or report to county officials, or take any public steps in opposition to the Evergreen development. In the view of the Supreme Court, Mary Firestone was an involuntary recipient of public attention. The same cannot be said for Moore. He placed himself in the public spotlight by making several speeches at public hearings and being among the leadership of the opposition to development on the reservoir.

Moore did exactly what the Gertz test is focused upon. He can fairly be said to have thrust himself into the forefront of the debate on development along the reservoir so as to defeat or stop any effort at development. At the very least, he so situated himself as to be drawn into that debate. Either way, Moore is a public figure.

Yet now, in the context of this action, Moore attempts, at least in some of his testimony, to claim that all he did was act as a private citizen in protecting his own private interests. Such a posture is to be expected in litigation of this kind. But as we have seen that characterization of Moore's activities is undercut by his own letter of November 1974, his own witnesses, and his own words. He was a leader in the opposition to development affecting the reservoir and, therefore, the mantle of a public figure rests well upon him in this case.

The same conclusion, that Moore is a public figure, is compelled by a proper analysis of Gertz. There, Gertz, a lawyer who represented the family of a man who was killed by a Chicago police officer, was labeled in a nationally distributed magazine as the architect of a frame-up of the police officer who did the shooting. Gertz was also described as having a criminal record, as being a "Leninist," as being a "Communist-fronter," and as being a member of the "Red Guild" that was allegedly harassing the police officer.

The only contact that Gertz had with the criminal case was that he sat in silence at a coroner's inquest. In truth Gertz had nothing to do with the criminal charges against the police officer. Gertz repesented the decedent's family for civil purposes only. On those facts the Supreme Court quite easily concluded that Gertz was not a public figure as to the controversy surrounding the trial and conviction of the Chicago police officer.

In this case the facts are entirely different from those in Fleming I and they compel a different result. Moore was a public figure and this Court should have ruled as such. Had that ruling been made, the actual malice standard would have applied to plaintiff's attempt to prove liability. But because of the erroneous ruling on Moore's being a public figure, this case went to the jury on the wrong standard. To correct this error, the verdict must be set aside.

4. Fleming's Statements Were Qualifiedly Privileged Under Virginia's Fair Comment Rule

On several occasions during the trial, Fleming's counsel were cut off when they asked whether Moore had a right to make the statements he made or whether citizens in the United States have a First Amendment right to comment in the manner employed by Fleming. Tr. at 121. It was error to suppress this issue becuase [sic] Virginia recognizes such a concept in its fair comment rule.

James v. Haymes, 163 Va. 873 (1935) sets forth the rule on fair comment. Haymes, the plaintiff below, was a contractor. James, the defendant below, owned and published the Danville Register newspaper. In an article in the newspaper, the paper charged Haymes with doing slow work and making poor progress on constructing a certain road that led into the tobacco markets in Danville. The newspaper said that the work on the road was so slow that the road might not be ready for use during tobacco season. The newspaper urged the Highway Commission to instruct the contractor to build

the road in small sections so that traffic could be more easily detoured during the height of tobacco season. The newspaper also stated that it failed to understand why the contractor on the road had been given such an unreasonably long time to work on one of the most important highways in the state.

. . .

Fleming I, 221 Va. at 894. The fact that compensatory damages "should not necessarily be restricted to out-of-pocket loss" does not mean that out-of-pocket losses need not be proved. It merely means that once they are proved the damage award can extend beyond them. By the same token, the fact that special damages "are not limited to pecuniary loss" does not mean that pecuniary loss does not have to be proved as a part of special damages. It merely means that once pecuniary loss is established the damage award can extend beyond them. To read Fleming I any other way is to create a back door route to securing presumed damages which the Supreme

Court of the United States condemns in Gertz and which the Supreme Court of Virginia condemns in Fleming I.

Moreover, the correctness of this reading of Fleming I is established by analysis of Slaughter v. Valleydale, 198 Va. 339 (1956), a decision which remains good law in Virginia to this day. There, the Supreme Court said that only in cases of libel per se may the plaintiff "recover a verdict for substantial damages without giving any evidence of pecuniary loss." 198 Va. at 347. The necessary converse of the rule is that in a case that does not involve libel per se a verdict for substantial damages can only be secured upon evidence of pecuniary loss. This latter principle is entirely consistent with holding of Fleming I. It merely means, as is stated above, that pecuniary loss must be shown but that recovery of damages is not limited to that showing. If that rule is adhered to, the jury, at the least, will be given some clue with respect to the proper magnitude of compensable damages. Without that clue the jury is left to guess, which is the same as being left to presume, which is forbidden.

Slaughter is also instructive for its definition of special damags.

> "Special damages are such as in fact have actually occurred as the result or consequences of the injury complained of, and not implied by law. They are either super-added to general damages arising from the act injurious in itself, as where some particular loss arises from the uttering of slanderous words actionable in themselves; or are such as arise from an act indifferent and not actionable in itself, but injurious only in its consequences, as where words become actionable only by reason of special damage ensuing."

198 Va. at 347, quoting Rosenberg & Sons v. Craft, 182 Va. 512, 520 (1944). Significantly, in the instant action there is not a scintilla of evidence of any damage that has occurred as a result of the publication of the ad. Thus, no special damages have been shown and since their showing is required by Fleming I, this verdict must be set aside.

Slaughter is also helpful in that it states the well-setled rule that damages cannot be recovered if they are speculative or remote.

> "A successful plaintiff in an action for libel or slander is entitled to recover such actual or compensatory damages as are the natural and direct or proximate result of the publication but not speculative or remote damages, the rule applying to special as well as general damages."

198 Va. at 347, quoting 53 C.J.S. Libel and Slander § 240 at 363. Here there are no damages that can fairly be said to be the natural and direct or proximate result of the publication of the ad. Moreover, with regard to the nature of any proof of damages it should be absolutely clear that the record is devoid of proof but if a modicum of evidence can be culled from this case it must surely fail to support any damages due to its speculative nature. Put another way, in our view there is no evidence of damages but if any can be said to exist it is necessarily remote and speculative.

In considering the question of whether any damages have been proved in this case, it is important to focus upon the holding in Gertz and the rationale that underlines that holding. The Court held as follows:

> [W]e hold that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.

418 U.S. at 349. The court gave the following explanation of its rationale:

> The common law of defamation is an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss. Under the traditional rules pertaining to actions for liable, the existence of injury is presumed from the fact of publication. Juries may award substantial sums of compensation for supposed damage to reputation without any proof that such harm actually occurred. The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. Additionally, the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact. More to the point, the States have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury.

418 U.S. at 349. The present case involves a gratuitous award of money damages far in excess of actual injury. This is the very type of case that Gertz and Fleming I are meant to guard against. In order to give full effect to those decisions, this verdict must be overturned.

E. A Nominal Damage Instruction Was Required In This Case As A Matter Of Law

The jury in this case was never made aware that it could vindicate Moore's rights without awarding him substantial damages. That same problem existed in The News Leader Co. v. Kocen, 173 Va. 95 (1939). There, a news reporter erroneously identified plaintiff as having been charged with a crime. The court said that although the reporter may have been negligent there was no evidence of actual malice. The jury returned a verdict of $2,500.00. On appeal the Supreme Court reversed the judgment of the trial.

. . .

Yet, even after diligent search not a single case involving such a paucity of evidence as exists here has been found in Virginia where a jury verdict anywhere near this magnitude has been upheld. That alone is a fair indication of the serious injustice embodied in this verdict.

G. There Was No Proof Of Actual Malice In This Case

Punitive damages can only be awarded in a case of this kind upon proof of "actual malice." Moreover, in a case involving a qualified privilege as this one is, liability cannot be established absent proof of actual malice. That now familiar concept is defined as knowledge of falsity or reckless disregard for the truth of an assertion. The case law makes clear that where actual malice is required to be proved it cannot merely be shown to be a possibility, it must be proved within clear and convincing evidence. Fleming I, 221 Va. at 893. No such proof was made in this case.

Nowhere in this case is there any proof that Fleming knew at the time the ad was pulished [sic] that Moore was not acting towards him on the basis of racism. Fleming certainly makes no admission of that kind nor is this fact proved by any other witness.

With respect to reckless disregard for the truth, the record contains the same lack of evidence. Fleming recited the events as he saw them in terms of the opposition to his development. As cases such as Scarpelli v. Jones, 626 P.2d 785 (Kan. 1981) demonstrate, it is altogether proper to view the facts from Fleming's perspective. And because of the objective facts that are discussed above in Section 4, Fleming told the jury that he concluded he was a victim of racism. He also noted that in his experience no white person had ever walked up to him and admitted being a racist. Tr. at 205-206. Thus, protestations on the part of Moore and other witnesses that he is not motivated by racism does not mean that Fleming acted with actual malice. It merely means there was a dispute above Moore's motivation. Displaying this dispute to the jury is not the same as

providing clear and convincing evidence of actual malice. AS [sic] a consequence, there was no basis upon which the jury could have imposed liability nor is there any basis upon which the jury could have awarded any punitive damages. For both reasons the verdict in this case must be set aside.

H. The Interest Awarded In This Case Is Contrary To Law

The jury in this case awarded interest at the rate of "12% per year from January 16, 1976 until paid." The maximum rate of interest that can be awarded by a Virginia court on an unliquidated claim is the judgment rate which applies only after judgment is entered. That rate is 10%. Va. Code § 6.1-330.10. It only went into effect in 1981, five years after the date of publication of the ad. Prior to that time the judgment rate had been 8%. In addition to the judgment rate of interest, by statute, Virginia provides for a legal rate of interest. That rate is 6%. Va. Code § 6.1-330.9.

It is clear from the interplay between the two statutory provisions that Va. Code § 6.1-330.9 sets a

maximum rate of interest of 6% before judgment where there is an unliquidated amount and Va. Code § 6.1-330.10 sets a maximum rate of interest of 10% once judgment is entered. Va. Code § 8.01-382 permits a jury or a trial court sitting without a jury "to provide for interest on any principal sum awarded and fix the period at which the interest shall commence." That

. . .

> public or general concern, the plaintiff was required to prove that the articles were published with 'actual malice.' In Rosenbloom and Sanders, the relevant test was not the status of the plaintiff involved but rather the events which were the subject of the publication.

216 Va. 802-803. Yet even though the Court knew it could have overruled Sanders, it did not. All the Burke court did was to note in a footnote on page 804 of that decision that since Gertz some state courts have reaffirmed the actual malice test and others have imposed a negligence test. Again the Supreme Court has not said

what it will do. And until it acts, Sanders is the law on the standard of proof required to recover compensatory damages.

There was no basis upon which the Court could conclude that negligence had anything to do with this case. In effect, this Court disregarded existing Virginia law and has resorted to an unnecessary, unwarranted guessing game.

J. The Lack Of Any Blacks On The Jury Violated Fleming's Constitutional Right To Due Process

The Fourteenth Amendment to the United States Constitution provides in pertinent part as follows:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Due process has been variously defined over the years to include the concept of "fundamental fairness" and as a flexible concept that depends on time, place, and circumstance.

In Holden v. Hardy, 169 U.S. 366 (1898) the Court said this about the meaning of due process:

> This Court has never attempted to define with precision the words "due process of law," nor is it necessary to do so in this case. It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard. . . .
>
> . . .
>
> Recognizing the difficulty in defining, with exactness, the phrase "due process of law," it is certain that these words imply a conformity with natural and inherent principles of justice. . . .

169 U.S. at 389-390. In more recent years, the Court has added the following about the meaning of due process:

> "'[D]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. . . . Representing a profound attitude of fairness . . . 'due process' is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess. . . ."

Ingraham v. Wright, 430 U.S. 651, 675, (1977) quoting Anti-Facist Comm. v. McGrath, 341 U.S. 123, 162-163 (1951) (Frankfurther, J.,. concurring). The Court has

noted that due process and equal protection are not mutually exclusive and sometimes overlap. Bolling v. Sharpe, 347 U.S. 497 (1954).

The fact that no blacks served on the jury that heard this case calls into question the fundamental fairness of the trial Fleming received. This was not an ordinary case of a land dispute, or a contract dispute, or a personal injury dispute. It was a rare case in which a black man was pitted against a white man over the question of whether a charge of racism was defamatory on the facts adduced at trial. Fleming does not urge a sweeping new principle of constitutional law that all juries must contain quotas of various population groups or even a fair cross-section of the community. He does not assert that a black defendant must always be tried by a jury with one or more blacks or a white defendant must be tried by a jury with one or more whites. Rather, Fleming urges that on the narrow facts of this case, where the issue of race is at the core of the case, he was denied due process by the absence of any black on the jury.

That race is unlike any other issue before the courts is undeniable. Racism and charges of racism have torn at America's social fabric from 1619 to the present. It can be asserted without need for citation that race relations, racial prejudice, and racial anymosity are fundamental, unresolved problems in America. This fundamental social condition cannot be forgotten the moment a citizen is tapped to become a juror. The upshot of this condition is that black and white jurors bring markedly different perspectives on race relations with them as they step into the jury box. Despite their best intentions, neither group can fully appreciate the perspective of the other. For this reason, there is substantial doubt whether a jury composed entirely of white or entirely of black citizens can bring to bear a balanced perspective on an issue where race is central. In short, neither an all white nor an all black jury can fulfill the due process model of a jury consisting of a fair cross-section of the community in a case where race is at the core.

Fleming's case illustrates the unfairness of an all white or all black jury sitting in a case where race is the central issue. Consider the issue of actual malice. To resolve that issue, the jury was required to step into Fleming's shoes and determine from his perspective whether he knew that Moore was not a racist or acted with reckless disregard as to whether that was so. The difficulties of white jurors to assume that posture are obvious. Is it not obvious that the addition of a black juror in the jury room would have added a different--and fundamentally necessary--perspective in the deliberations?

The problem here would arise wherever one group had the sole power to determine whether a member of that group is entitled to relief from a non-member of that group. For example, consider whether it would appear fair for an all black jury to have heard this case and to have returned a verdict in favor of Fleming. A lawyer for Moore might wonder what happened in the jury room. Consider whether it would appear fair for an all male jury to try a charge of

sex discrimination brought by a female against a male if that jury returned a verdict in favor of the male defendant.

Fundamental fairness must require that the legal system operate in a manner that gives justice in substance as well as the appearance of justice. Fleming submits that in every example listed above an impartial observer would admit that he would "feel" better had at least one person of the opposite group been present to engage in the deliberations. One white on the all black jury, one woman on the all male jury, one black on the jury in this case would dispel any lingering sense of injustice because it would be some assurance that the subject jury acted in faithful adherence to the instructions of the court and fairly weighed the evidence.

The Supreme Court of the United States has often addressed the racial composition of jury panels. See e.g., Constenada v. Partida, 430 U.S. 482 (1977). See also Moultrie v. Martin, No. 81-6493 (4th Cir. Sept. 30, 1982). The Court has not hesitated to insist that jury panels were fundamentally defective and violative of

due process for their exclusion of various minority groups. Admittedly, the Supreme Court has not extended its analysis to the composition of an individual jury itself. But so far as Fleming is aware, that issue has never come before the Court--certainly not in a case where, as here, the issue of race is central.

The analysis applied by the Supreme Court in some of its cases, however, apply directly to the question Fleming raises here. One such example is Taylor v. Louisiana, 419 U.S. 522 (1975), in which the Supreme Court found a violation of the Sixth Amendment right to trial by jury where women were underrepresented on Louisiana's petit jury roles.

> A unanimous Court stated in Smith v. Texas, 311 U.S. 128, 130 (1940), that "[i]t is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community." To exclude racial groups from jury service was said to be "at war with our basic concepts of a democratic society and a representative government.

419 U.S. at 527. In this case, there were only three blacks on the jury panel. One was excused for cause.

The other two were preemptorily stricken by Moore's counsel. Without a single black on the jury true community representation was absent. The need for such representation was also referenced in Taylor.

> "It must be remembered that the jury is designed not only to understand the case, but also to reflect the community's sense of justice in deciding it. As long as there are significant departures from the cross-sectional goal, biased juries are the result--biased in the sense that they reflect a slanted view of the community they are supposed to represent."

419 U.S. at 529, note 7, quoting H. R. Rep. No. 1076, 90th Cong., 2d sess., 8 (1968).

case previously. No case has been made out to go to the jury, because the case includes Mr. Fleming's own recital own recital which would rebut any suggestion of wrongdoing on his part which would give rise to the cause of action. It would seem that the plaintiff has had to show to this point at least by a preponderance of the evidence a defamation, a libel. Other than conclusionary allegations on the part of the plaintiff, first of all missing from that is the component of damages. Now, Mr. Moore has testified as have his witnesses that there was no damage. That would have to be a necessary

component of his case. There is not enough in simply saying that I was distressed, simply saying that I was greatly embarrassed, that is not enough under the measure or the test provided in Fleming v. Moore to allow a jury at this point, if we did nothing else to speculate on the worth of his case. The other part of it is that we would have to insert again our right to say things, though they might have fallen unpleasant, though they might have given rise to anger on the party of Mr Moore. Mr. Fleming has a constitutionally protected right given all those circumstances that we now know comprised the conflict between these two men to say what he believed to be true as it concerned him at that time. If Your Honor would have had an opportunity to research some authority, I doubt whether you would have found any case with an unsettled judgment wherein the allegation was that someone was called a racist or someone suggested that that person was inflicted with race as a standard for libel. We have found no such authority. Perhaps Mr. Albro can suggest something to the court but you have to view the assertion by Mr. Fleming

that the claim of race is within the context of what happened to him and how Mr. Moore was involved directly or indirectly in that occurrence. And the case has to be weighed in that light and then insert in that measurement this firm amendment protection. The first amendment protection runs whether or not he is a public figure, but if he is a public figure as we submit that he must be found to be at this point, the burden becomes one of showing by clear and convincing evidence that Mr. Fleming purposely lied or was so reckless in what he said about the man until it was tantamount to a lie. And if you measure, if you take that test and measure it against what is the evidence in this case you cannot, you cannot come to such a conclusion given the, certainly given the higher test, not even given the minimal preponderance test because what he said must be measured in a subjective rather than objective sense. If he believed what he said was true that's sufficient. Whether it was true or not, he made a mistake, he's not responsible for it. There must be some culpability. He's not punished in a libel case for negligence, he is punished for

a malicious state of mind. And there's simply nothing in here to that effect. Here's a man who saw his dreams for his subdivision out there abolished in effect by what he perceived as the racist conduct of Albemarle County

back if you'll rmain outside and not come back into the court room until the Bailiff admits you.

JURY IN RECESS.

THE COURT: All right, has counsel had an opportunity to compare instructions yet?

MR. ALBRO: No, sir, we've got a set.

THE COURT: I'll give you about ten minutes to compare instructions and that may enable us to direct our attention to the areas of difference.

MR. POINDEXTER: Yes, sir, could we as a prerequisite could we start with a motion to strike?

THE COURT: Yes, I'll be glad to hear your motion. You may proceed with your motion.

MR. POINDEXTER: Yes, sir. Your Honor, first we have to start way up here with the libel or defamation. That can only be accomplished through an intent to use language or word that hurts someone with a knowledge that what you have said is false or you utterly disregard the facts as you know them to be or as they could be ascertained and you say so. Then in this case that certainly cannot be shown to exist. Whether what Mr. Fleming said was true or not, there is absolutely no showing, noth.... nothing indicates, not one scintilla of evidence to show that he made a false charge given all of the circumstances as they existed then, or that he recklessly made an accusation of any kind against Mr. Moore or anybody else. Now he says, and it goes undisputed, that he was the first black person in the history of Albemarle County to undertake a development of any consequence, and there is ample testimony to show that he was turned down on two occasions and had unusual and weird, contorted restrictions and conditions imposed

upon him throughout this process, and while all along around him, before and after, white property owners, white developers, were one way or another accomplishing what it was that they wanted to accomplish around the reservoir in the terms of commercial development. Now given those circumstances alone, he could conclude that I am, in his own mind, a victim of racial discrimination. I am black, I'm the only one attempting this, I'm the only that's ever attempted this, I'm the only one who is being frustrated in my attempts to develop, I have met all the conditions as I know them to exist in the county to initiate this development and they keep turning me down. Was he tunrd down by people who were not suspect, were there any black people involved in this process? No. All of the persons to whom he had to go have been identified through the testimony of the witness that appeared before the court were white people with the possible exception of one Planning Commission member, who it was that Mr. Fisher cound't even remember his name. So his involvement in all of this may, must not have been terribly effective or

important. We don't even know what time frame this man served on the Albemarle County Planning Commission. Then he initiates a lawsuit in Federal Court, he makes his claim, says I am being discriminated against, I am being denied constitutional rights, due process, etc., they go to trial four days; the judge says listen, this is what we can reasonably infer, listen, what in the world has happened to this man? Give him his 2.5 unit density per acre The Board is stampeded in front of Judge Turk, they run back, they go to a public hearing and give the man, after all these years, they give him 2.5 units per acre density. Chairman of the Board of Supervisors the next day gets up and says, ho....in fact a hollow victory, we ain't giving him nothing, we've still got a moratorium out there, he'll never develop anything, goes in the court, volunteers to, voluntarily attempts to overturn the settlement by aiding the intervenors, has the same attorney to create the intervention process that had...representing him and his wife, Mr. Moore, from representing Mr. and Mrs. Bedford Moore on one day to representing the two intervening bodies on the next, all in an effort to stop Evergreen.

Now what could Mr. Fleming logically conclude from all this? All this increased concern about beautification of the reservoir. Surely it had been of some concern in 1972, 1971, '69, for as long as Ivy Creek has drained into that man-made water shelter out there, it's been of some concern that one day because of pollution, run-off, chemical plants, of the Acme Visible Records, Morton plant, all drain right into this body of water and one day you'd have a problem. Everything came forth when Jim Fleming, black developer, announces his plans to create a subdivision out there. Everything converged. All at once a 37 year old house is designated a historical site, not only in Virginia, but on the Federal register. Overnight these things occurred within months of each other. Increased concern. There are four studies commissioned of the reservoir within the context of this application, when this application is pending before officials here in Albemarle County. He is called a racist in 1975 by the newspaper because he raised the issue. The stage is set, racism. That's an exhibit in the case. Mr. Green from Richmond, Mr.

Fleming from up here, they run around calling people racists, they're racists. All right. Mr. Fleming didn't sue the newspaper, I guess under the law that we know it to be. He could have, but it didn't even occur to him that he had a cause of action against a newspaper because it made a comment about him in the midst of a public controversy, a controversy of great interest in this community. Does he have a right to say anything in return? I mean, do we have a First Amendment or do we not? So he says, after all of this has fallen upon him, racism, I've been trying now for three or four years to effect a housing development out there, I am frustrated, these people are stopping me, they claim it's pollution, they claim it's eutrophication, they claim whatever it is, but I know what it is. I am black, I am being discriminated against; and he was vindicated four months later by the court urged settlement. He talked about things as he perceived them. Where is the attention. . . where did his attention focus? It focused on the one man who was closest in his mind to all of this, the man sitting right over there. Now to rule in our favor in, on this point is

not to chastise Mr. Moore, it well could be that Mr. Fleming was wrong about Mr. Moore, but that's not the issue. Did he have a right to believe that Mr. Moore was one of the....let's put it this way, ring leaders, ring leaders of this ongoing effort to deprive him of his right that he thought he had as a citizen of this country to develop property that belonged to him. Mr. Moore said in testimony, well, Mr. Fleming didn't conform to what I wanted him to conform to. He should....I was willing to dedicate my life to the public trust, Mr. Fleming was not, I thought he should have. Mr. Moore we submit has, has become by any stretch of any case that's a significant, Your Honor, a public figure just as much as Mr. Fleming had become a public figure and we should concede that indeed at that time in this place he was a public figure, if not for any other reason, the paper and its attention upon him and what he was doing caused him to be a public figure.

Now does he not have a right, given the money he's spending out there, his ownership of property which he cannot do what he thinks that he has a right

do so with, can he not as a free American citizen protected by our Constitution, protected by the First Amendment, protected by even something closer to us, a common law sense of privilege that a man can say something about something he owns or has a pecuniary interest or a social interest or a political interest in, can a man under those circumstances, a man can say something to people that he believes would have at least some interest in the... (inaudible). So what did he do? He said, I'm not getting a fair shake in the Progress index. Every....they've already called me a racist; the reporting seems biased, I am going to an audience where I might get some attention, where I might get some sympathy That old...the editor then, obviously he's opposed, he's not in favor of me and he goes through...we can assume that he went through his files, he pulls out the editorial where he'd been called a racist. He says, I've got to get my message through. I want to comment my way on this controversy that affects me, not only me, these are public officials making these decisions. These are, these are tax exempt organizations, these are

public...the league, League of Women's Voters, the different State agencies. I have a right to strike back, to talk back, and he does it. He goes up to the University of Virginia, he knows there's a paper up there that's widely read, probably more widely read in a certain liberal, so-called liberal segment of this community than in other parts of the community, and he addresses that community. He says, this is what's happening to me here in the shadow of Monticello; this is what's happening to my dream, just like Jefferson had a dream, he invokes Jefferson as Judge....Justice Harrison said, he compared Mr. Moore with Mr. Jefferson; Mr. Moore came out on the short end and there's nothing wrong with that. He had a right to say these things. He says this, not only does he go to the paper, The Cavalier Daily, but he also goes to the black community. He has friends in the black comunity; he wants to articulate to the readership of the black community at the same time what's happening to me, Jim Fleming, and he tells them. Now, Your Honor, given all those circumstances, adjust it against the fact that we have no damages. What's he

going to tell the jury that all this is worth? Is there any mention, any money been mentioned, any expert testimony as to what all...how you compute this in dollar value, what this man's embarrassment, which he may have suffered, humiliation, he may have suffered. Does that mean he's entitled to money? There are things said about all of us at different times by different people. It may have been said about Your Honor at some time or another when you turned your back on that jury decision down in Goochland. May have been all kinds of things said about you. That's unprecedented in this state. People have a right to say it. It may have hurt you, because I know, you know, the background from which you operated when you did that. But there are all kinds of things said in the media and by people about other people and we get offended. Things have been said about me, Mr. Carter, Mr. Albro I'm sure, maybe even the Clerk of the Court, but that does not mean that we can use something that simply offends us or makes us feel embarrassed to cut off the right of another citizen, to speak freely about matters that affect him or her. Your

Honor, there ain't nothing in this case. You know, we've been trying to tell them that since 1977, there is nothing in this case, and now that we've heard it all, put it to rest at this point. Do what you should do as a judge, apply the law, let this man go, don't impose it upon those citizens. You know, if they'd made out a factual dispute, juxtaposition of facts of one against the other, there would be something to give to him, but it is your obligation now and you were thrust into this at a rather late date, and I would suppose that even as diligent as you are, you have not read all the law that may apply and Tom Albro and I have been working on it a long time and I'm sure we haven't read all the law that applies in this situation, but Your Honor, you should know enough about it now to do what should have been done a long time ago and dismiss this case and not leave it to those people who have no particular responsibility. There's no, there are no facts in dispute, there's nothing. Now this is framed against the fact that if you play around with the burden of proof, we find out that all this should have been, to make anything significant out of this, you

got to do it not by the usual standard, preponderance, we're not even talking about that, clear and convincing. I don't know what it means to me, but I guess it means something to you as a judge, one of the cases said that it was intermediate evidence, somewhere between proof beyond a reasonable doubt that applies in criminal cases, I never knew what that meant, and a preponderance of the evidence that applies in the usual civil case. This is a special case, special, special burden to get some money. When you start talking about infringing upon a man's right to say something, they haven't done it. And we would submit Mr. Moore, public person, man at the University, I'm just a modest little professor. Mr. Shannon comes in and says, this man is the official meeter and greeter, known all over campus, the first man that the visitors, the dignitaries at the University meet, and he greets them, makes them feel good, gets them houses and then brings them to me, he's a special man at the University. Not only that, special man out here in the community, living in a castle on the mountain, a replica of Monticello, house on the National

Register of Historic Places, or about to be put on it, federal acknowledgment of the, the home, a leader in the opposition against Evergreen, the only man that we have ascertained from all of this who hired lawyers to come down adn speak for him. With that, again the burden is that he must show, as he cannot, that Jim Fleming lied about him or so disregarded his role in all of this until it was just like being a lie. And that doesn't mean make mistake about it. That simply means that Jim lied, or misconstrued everything he did to such a reckless, utter disregard for this man that it was just like a lie. Your Honor, it's just simply not here and this is the juncture to put it to rest. This is the last....could be the last litigation surrounding this mess out on the reservoir that

IN THE CIRCUIT COURT OF ALBEMARLE COUNTY, VIRGINIA

W. BEDFORD MOORE, III,

Plaintiff,

v.

JAMES N. FLEMING,

Defendant.

Law No. 976-L

December 17, 1982

REPLY MEMORANDUM ON BEHALF OF JAMES N. FLEMING

Pages 14-18; 23-26

the instant verdict is excessive. There, three postal workers were awarded compensatory damages of $10,000 and punitive damages of $45,000 as a result of a union publication directed to local union members accusing plaintiffs of being "scabs," traitors, and men of low character and "rotten" principles. As in this case, the publication was disseminated among the plaintiffs' co-workers, although Moore had the comparative advantage of being tenured which the postal workers obviously did not.

Significantly, the actual injuries of the workers were much more severe and concrete than any experienced by Moore: the workers experienced migraine headaches due to tension and nervousnes [sic], their co-workers stopped speaking to them, they were vilified at social gatherings, and they experienced a variety of other concrete problems. In spite of such injuries, the jury's award in that case pales in comparison to the verdict here. In fact, the interest alone in this case exceeds the award in Austin even if adjusted for inflation from 1972.

(3) The Award Of Punitive Damages Is Grossly Excessive

In considering the punitive damage award in this case, it is well to bear in mind what Fleming did: he listed in the advertisement a series of known facts and drew his own conclusion from them--that Moore had been guilty of racism. The Supreme Court of the United States in Gertz cautioned courts around the country that libel actions as permitted in many states threatened basic First Amendment values, in particular the

traditional protection afforded to free expression of personal opinions. It said:

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correct not on the conscience of judges and juries but on the competition of other ideas.
>
> * * *
>
> [T]he doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact. More to the point, the States have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury.14/

418 U.S. at 339-340, 349.

14/ Gertz, who was libeled by being accused of being a Communist, was awarded $50,000 in compensatory damages.

The Court went on to impose new safeguards, which it found to be mandated by the First Amendment, designed to ensure that juries did not vindictively punish libel defendants for engaging in "'uninhibited, robust, and wide-open' debate on public issues." 418 U.S. at 340.15/ Thus, the Court held that the States may not permit recovery of punitive damages by any plaintiff--public figure or otherwise--without a showing of knowledge of falsity or reckless disregard of the truth. Speaking particularly of punitive damages, the Court in Gertz said that juries should no longer be permitted to "assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused." 418 U.S. at 350.

The punitive damage verdict in this case is a stunning example of an award which bears relation whatever to the harm caused. Moore candidly admits

---

15/ The Court said that even the "punishment of [acknowledged] error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedom of speech and press." 418 U.S. at 340.

this in his Memorandum conceding, in effect, that the punitive damages were awarded on an improper basis which demands correction. Moore states:

> This figure [$250,000] was not fabricated; rather it was a logical monetary award derived from the evidence produced at trial. During the trial, Fleming admitted that he understated his net worth during pretrial deposition testimony by approximately $500,000.00. In fact, Fleming admitted at trial cross-examination that his net worth closely approximated one million dollars.

(Mem. In Opp. 42). The nature of the defendant's conduct in libeling the plaintiff is admittedly a proper consideration for awarding punitive damages. But a defendant's conduct at trial, his demeanor and his apparent candor or lack thereof, are most certainly not a proper basis for punishment in the favor of punitive damages. Punitive damages are not designed to make the defendant a better or more truthful witness; they are to discourage him and others from certain conduct vis a vis the plaintiff. The jury's punishment of Fleming for

testimony related to his assets is alone grounds for ordering a new trial.

There is additional, equally compelling evidence that the jury was consumed and carried away by passion. First, there is the fact that Fleming will have one-half of his wealth taken from him for actions which, even if reprehensible, harmed no one. No crime he could have committed would have carried such punishment. Thus punitive damages, intended merely as a civil aid to the criminal law, will have totally supplanted it. It is interesting to compare the award in this case with the largest award of punitive damages on record in the United States. Grimshaw v. Ford Motor Company, 174 Cal. Rptr. 348, 119 C.A. 3rd 757 (Cal. App. 1981), the infamous Pinto case. There, the jury awarded Richard Grimshaw, a victim of severe burns, $125,000,000.00 in punitive damages. That sum represents the profits from one quarter's operations by Ford. Imagine the reaction if the jury had awarded Grimshaw half of Ford's total assets. Grimshaw thus highlights the complete disregard of proper proportion in the jury's award.

The interest component of the award is also reflective of a jury on the rampage. It is difficult to take seriously Moore's assertion that the 12% interest assessment on $250,000.00 does not apply to the punitive damages component of the award in the identical amount. One glance at the verdict form dispels any such notion. It is understandable why Moore wishes to deny the obvious: interest on the punitive damages serves to exacerbate an already oppressive award. It vindictively adds insult to injury.

It is also significant that the jury applied a 12% rate of interest as far back in 1976, when interest rates were half that amount. While 12% may not be reflective of the rates in 1981 or part of 1980, it constitutes an unrealistically high rate over the past six years. Over those six years through December 1982, it produces total interest of approximately $210,000.00. The interest rate has thus been applied in a manner indicating that the jury was carried away with its zeal to bring Fleming to his knees. Moreover, as shown in Fleming's opening Memorandum, the interest rate is contrary to law.

B. The Jury Was Improperly Permitted To Award Compensatory Damages A Showing Of Special Damages.

Moore advances a reading of Fleming I in which the Court would overturn a century of establish law sub silentio. The Court obviously does not make such a sweeping claim for the opinion. Moore's reading of Fleming I does indeed establish "a back door route to securing presumed damages." Certainly that is its practical effect in this case.

. . .

the jury would then have been instructed on the presumption of good faith. Preston v. Land, 220 Va. at 121. Such an instruction would have been an incalculable legal and psychological boon to Fleming's case.

Moore has himself cited the second benefit that would have been Fleming's had the Court ruled that a qualified privilege applied. He states:

> The effect of such a ruling, made in this case, is to shift the burden of going forward with the evidence to the

> Plaintiff to show that the privilege has been lost.

(Mem. In Opp. 11) (Citations omitted). Thus, instead of having to prove negligence in order to recover--as Moore did here--Moore would have been required to prove common law actual malice in order to overcome the privilege and recovery compensatory damages. Again, the damage to Fleming's case is obvious and immeasurable.

D. Moore Cannot Escape The Clear Evidence That He Is A Public Figure

Moore has fundamentally misunderstood the proper test for public figure status unde the applicable decisions of the United States Supreme Court. Moore repeatedly stresses that he did nothing to "thrust" himself into the public eye, that he did not, for example, grant interviews with the press or organize opposition to Evergreen. While Fleming, as discussed below, takes vigorous exception to Moore's allegations that he did not thrust himself into the fray, it is critical to appreciate that a party need not actively seek out public attention

in order to become a public figure (as opposed to a public official, for example). A party may just as easily be "drawn into" a particular controversy. The important consideration is the level of notoriety he has gained, not how he got it. This is made plain in Gertz:

> More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions.

418 U.S. at 351.

Moore also emphasizes the fact that he was involved in the Evergreen controversy in the purely private capacity of an adjoining landowner. Again, Moore misses the mark. A party's motivations for becoming involved in a controversy are immaterial. It is the fact that he has assumed a position of prominence on an issue that is critical. Undoubtedly the majority of persons involved in public controversy have their own private axes to grind. Only a Ralph Nader or someone

similar would not. Further, Moore would have the court look only at his actions with respect to the Evergreen projects in deciding whether he is a public figure. But Evergreen is only a part of the broader question of development affecting the reservoir. Thus, all of Moore's activities respecting such development bear upon his public figure status. He cannot fairly argue that he could lend opposition to development affecting the reservoir and escape the public figure label in this case by the simple expedient of never mentioning the word Evergreen. Moore has failed to rebut the salient facts demonstrating that he assumed a role of prominence with regard to developments affecting the reservoir. Here the facts are different from those in Fleming I. Those facts make plain that Moore was a public figure in terms of this development.

Finally, Moore raises the spectre that massive numbers of persons will be deemed public figures for appearing at local board and government hearings to air their own private grievances. He is wrong. Only those who become prominent or identified with a

particular cause will be deemed public figures. Once such a person obtains public figure status by his level of activity, he is then in a position to defend himself from real or imagined libels. The Supreme Court in Gertz pointed this out:

> The first remedy of any victim of defamation is self-help-using available opportunities to contradict the lie or correct the error and thereby to minimize its impact on reputation. Public officials and public figures usually enjoy significantly greater access to the channels of effective comunication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy.

418 U.S. at 344. Moore had the opportunity that a public figure has to counteract Fleming's charges. In reality, Fleming did nothing more than challenge Moore's motivations in opposing Evergreen. Moore had ample opportunity to demonstrate that his motivations were honorable. The policy reasons for deeming him a public figure are thus met.

E. The Jury's Interest Award Was Improper

Moore has adopted an excessively broad view of the jury's power to a ward interest. In Moore's view, since Va. Code § 8.01-382 contains no explicit limitation on the amount of interest that may be awarded, the jury is free to do as it pleases. Under this reasoning, the jury may award interest at a rate completely unrelated to market conditions, thereby permitting it in effect to provide plaintiffs with relief far excess of their actual damages. Moreover, under Moore's view, since there is no limitation on the jury's ability to fix the date interest charges are to begin, it is possible for the jury to select a date before the occurrence of the injury.

Given these absurd results possible under Moore's reading of the statute, it is clear that there must be some limiting principle constraining the jury's award of

IN THE SUPREME COURT OF VIRGINIA

AT RICHMOND

JAMES N. FLEMING,

Appellant,

v.

W. BEDFORD MOORE, III,

Appellee.

PETITION FOR APPEAL

September 2, 1983

Assignments of Error, Questions Presented,

Pages 28, 30-31

II. ASSIGNMENTS OF ERROR

(A) The trial court erred in failing to either grant Fleming's Motion to Dismiss or strike plaintiff's evidence because the alleged libel was an absolutely privileged expression of opinion under the First Amendment.

(B) The trial court erred in failing to strike plaintiff's evidence because the alleged libel was not defamatory as a matter of law.

(C) The trial court erred in failing either to gant Fleming's Motion for Summary Judgment or his motion to strike plaintiff's evidence because plaintiff failed to prove special damages, which must include but are not limited to monetary loss.

(D) The jury's award is so excessive that it indicates the jury was influenced by passion, prejudice or corruption, or misconceived or misconstrued the law or facts.

(E) The jury's award of prejudgment interest at the rate of 12% per annum is contrary to law because prejudgment interest is not allowable on punitive damages and, further, because 12% exceeds the maximum allowable rate of prejudgment interest.

(F) The trial court erred in concluding that Moore was not a public figure.

(G) The trial court erred in refusing to instruct the jury that, in order to find Fleming liable for compensatory damages, it must find that Fleming knew what he was publishing was false or had reckless disregard for whether or not it was true.

(H) The trial court erred in refusing to strike plaintiff's evidence on punitive damages because there was insufficient evidence on which the jury could conclude that Fleming knew what he was publishing was false or had reckless disregard for whether or not it was true.

(I) In the specific circumstances and context of this case, the plaintiff's striking every black juror to create a jury without blacks deprived Fleming of his right to due process under the Fifth and Fourteenth Amendments and to a jury trial under the Seventh Amendment.

III. QUESTIONS PRESENTED

(A) Was the advertisement an absolutely privileged expression of opinion under the First Amendment? (Assignment of Error (A)).

(B) Is it nondefamatory as a matter of law to describe an individual as being motivated by "racism" in the course of debating an issue of public concern? (Assignment of Error (B)).

(C) Was plaintiff's failure to prove monetary loss grounds for granting Fleming's Motion for Summary Judgment or his motion to strike plaintiff's evidence? (Assignment of Error (C)).

(D) Was the jury's award so excessive that it indicates passion, prejudice or corruption, or a misconception or misunderstanding of the law or the facts? (Assignment of Error (D)).

(E) Was the jury's award of prejudgment interest on punitive damages contrary to law? (Assignment of Error (E)).

(F) Did the jury's award of prejudgment interest at the rate of 12% per annum exceed the maximum allowale rate of prejudgment interest? (Assignment of Error (E)).

(G) Was Moore a public figure? (Assignment of Error (G)).

(H) Where an allegedly libelous statement is published concerning a matter of general or public concern, must a plaintiff show, in order to recover compensatory damages, that the defendant knew what

he was publishing was false or had a reckless disregard for whether or not it was true? (Assignment of Error (G)).

(I) Was there evidence sufficient to submit to a jury that Fleming knew what he was publishing was false or had a reckless disregard for whether or not it was true? (Assignment of Error (I)).

(J) Were Fleming's constitutional guarantees of due process and trial by jury violated, in the specific circumstances of this case, because plaintiff exercised his preemptory strikes to create a jury without blacks? (Assignment of Error (I)).

. . .

> it becomes the plain duty of the judge, acting within his legal authority, to corect the injustice.

Moreover, as the court in Smithey noted, the size of the verdict alone is a sufficient basis on which to conclude that a verdict is excessive:

> The size of the verdict, so out of proportion as it is to the plaintiff's injuries and his medical expenses and loss of wages, is sufficient, standing alone, to shock the conscience of the court and to cast upon it the stamp of unfairness.

Id. at 148.

(1) Compensatory Damages Are Excessive

Even if Moore is allowed to break new legal ground and recover compensatory damages without showing monetary loss, by no stretch of the imagination can be he entitled to a windfall of $100,000.00. By any objective standard -- by the jury's award in the first trial, by the evidence at the second trial, or by precedent of previous libel verdicts in the Commonwealth -- the verdict here is shockingly excessive. Moore claimed that the ad had a deleterious effect on (1) his emotional state, (2) his teaching and relationship with his studnets and (3) his reputation. In support of these claimed damages, Moore offered only sweeping generalizations and conclusory and self-serving opinions. Opinions and

conclusions regarding injuries are not competent evidence -- especially when offered by the plaintiff himself. The Supreme Court stated in Gertz that a libel award must bear a "necessary relation to the actual harm caused." Gertz v. Robert Welch, Inc., 418 U.S. at 350. That necessary relation is entirely lacking here.

. . .

of injury, hardly justifies even a small fraction of the massive vedict returned by the jury.

Finally, Moore's claim of damage to his reputation rings false after the parade of eminent witnesses who testified to Moore's undamaged reputation. This Court has recognized the common sense principle that "[a] person may be of such high character that the grossest libel would damage him none ...." Ramsay v. Harrison, 119 Va. 682, 708, 89 S.E. 977, 985 (1916). That principle was borne out in this case. No one who knew Moore believed the allegations in the ad. It is significant that despite the allegedly highly charged racial

atmosphere of the time, there is not a shred of evidence that any student or faculty member, black or white, made any derogatory comment or held any negative opinion regarding Moore. On the contrary, Moore testified that he became embarrassed and "a little tired" by the level and fervor of support he received, including an unsolicited testimonial in the Cavalier Daily from a former student describing him as a Renaissance man (Tr. 91, 152).

In sum, the gravamen of Moore's complaint was that, solely in his own view, wholly unsupported by other testimony or evidence, the ad put a "gap in his honor." The weight of all the evidence was clear that no such "gap" was ever created. If there was a "gap" it was put right by the verdict on liability. The only justifiable damages would be nominal.

(2) Punitive Damages Are Excessive.

This case represents a classic -- and tragic -- example of the United States Supreme Court's concern in Gertz that juries, if left unchecked, have shown

a tendency in libel cases to "assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused." Gertz v. Robert Welch, Inc., 418 U.S. at 350. The gross disproportion of the punitive damages award in this case is a telling indicator that the jury as consumed and misguided by passion. The punitive damages award alone, with interest, is almost $500,000.00 at this writing. Thus, the punitive portion of the verdict which this Court is asked to sustain will strip Fleming of one-half of the accumulated wealth of a lifetime of hard work -- and for this use of a word that is "bandied about in our society with complete abandon." Fleming I, 221 Va. a 894 (Harrison, Jr., dissenting).

Viewed in its proper light, Fleming openly and passionately expressed his opinion on a matter of public concern and controversy. While that opinion may have been unpopular or even distasteful, it is no less subject to constitutional protection. The worst that can be said of Fleming's action is that he was guilty of a rhetorical excess which, even if reprehensible, was not shown to damage Moore's reputation. No crime Fleming could

have committed would have carried the punishment of this verdict. It is an affront to our system of justice that punitive damages, intended merely as a civil aid to the criminal law, will totally supplant it in this case if the award is left intact. Punitive damages here, far from having the disciplinary sting that is the goal and justification for such damages, will result in the practicl destruction of an individual and his business.

Finally, the interest component of the award is also proof of the jury's misconduct. Interest on punitive damages is unprecedented. It only serves improperly to exacerbate an already oppressive award. It is

IN THE SUPREME COURT OF VIRGINIA

AT RICHMOND

JAMES N. FLEMING,

Appellant,

v.

W. BEDFORD MOORE, III,

Appellee.

Record No. 831446

July 18, 1984

APPELLANT'S BRIEF

Pages 35-36

S.E.2d 271 (1967). The amount of the damages, however, "should bear some reasonable proportion to the real damages sustained and to the measure of punishment required; otherwise, they indicate prejudice or partiality." Stubbs v. Cowden, 179 Va. 190, 201, 18 S.E.2d 275 (1942). Here, there is wholly absent any sense of reasonable proportion. Moreover, the only warning to others that the punitive damage award will achieve is a chilling deterrence to vigorous and free public debate.

In Gertz v. Robert Welch, Inc., 418 U.S. at 350, the Supreme Court noted the tendency of juries in libel cases to award punitive damages based not on controlling principles of law, but instead on a subjective evaluation of the content of the comment:

> In most jurisdictions jury discretion over the amounts awarded is limited only by the general rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views.16/

16/ This Court has expressly stated that it shares this same concern regarding excessive jury verdict awards in libel cases. See Fleming I, 221 Va. at 893. Moreover, because of the possibility of self-censorship in derogation of the right of free speech, punitive damages may not be appropriate at all in any defamation action:

> Finally, the element most likely to give rise to self-censorship is the uncontrolled discretion of the juries to award damages which reflect their disdain for the publishing of an unpopular opinion, rather than a realistic level of compensation for the actual injury sustained. Therefore, as stated in Gertz, juries shall

(continued)

If the Supreme Court had known of the jury award in this case at the time it wrote the Gertz opinion, it no doubt would have cited this award as evidence that a libel case is fertile ground for an unjustified and excessive punitive damage award. If left undisturbed, the amount of

---

(continued from previous page)

> be limited to awarding damages for only actual injuries sustained, and shall not be allowed to presume the existence of any damages in the absence of a finding that the statement was published with knowledge that it was false or with a reckless disregard for the truth. While [compensatory] damages may be presumed upon a finding of "actual malice," under no circumstances will we allow a jury to award punitive damages.

Taskett v. King Broadcasting Co., 546 F.2d 81, 86 (Wash. 1976) (emphasis in original). Accord Stone v. Essex County Newspapers, Inc., 330 N.E.2d 161, 169 (Mass. 1975) (there may be no punitive damages in any defamation action, on any state of proof, because the possibility of excessive and unbridled jury verdicts grounded on punitive assessments may impermissibly chill the exercise of First Amendment rights by promoting self-censorship); Wheeler v. Green, 593 P.2d 777, 788-89 (Or. 1979) (punitive damages may not be assessed against any defamation defendant under any circumstances consistent with state constitution).

punitive damages that Mr. Fleming must pay, including interest, will approach $600,000.00 and will strip of him of over one-half of his total accumulated wealth. As such, these punitive damages do not punish Mr. Fleming--they destroy him, while simultaneously diminishing public debate and free speech.

Mr. Fleming only and passionately expressed his opinion on a matter of public concern and controversy. While that opinion may have been unpopular or even distasteful, it was nevertheless no more than an exercise of the right of free speech that all citizens of this Commonwealth enjoy [footnote omitted]. At its worst, the advertisement was a rhetorical excess which

IN THE SUPREME COURT OF VIRGINIA

AT RICHMOND

JAMES N. FLEMING,

Appellant,

v.

W. BEDFORD MOORE, III,

Appellee.

PETITION FOR APPEAL

August 13, 1985

Assignments of Error and Questions Presented

II. ASSIGNMENTS OF ERROR

A. The trial court failed to remit the compensatory and punitive awards to amounts that are not excessive as a matter of law.

B. The trial court failed to comply with the Fleming II mandate.

III. QUESTIONS PRESENTED

A. Whether remitted compensatory and punitive awards remain excessive as a matter of law (Assignment of Error A).

B. Whether the trial court violated the Fleming II mandate by not remitting the compensatory and punitive awards substantially (Assignment of Error B).

IN THE SUPREME COURT OF VIRGINIA

AT RICHMOND

JAMES N. FLEMING,

Appellant,

v.

W. BEDFORD MOORE, III,

Appellee.

Record No. 850622

Circuit Court No. 976-L

PETITION FOR REHEARING

Pages 2 and 9

Court's determination of what constitutes protected opinion in Chaves cannot, as a matter of law, be distinguished from Mr. Fleming's advertisement.

The failure of this Court to reconsider thse issues in light of the Chaves decision, and ultimately to enter final judment in favor of Mr. Fleming, will not only result in an unconscionable injustice to Mr. Fleming, but will also

violate Article 1, Section 12 of the Virginia Constitution and the First Amendment to the United States Constitution.

I. STATEMENT OF FACTS

This is a defamation action arising from the placing of a paid advertisement by James N. Fleming, a black real estate developer in Albemarle County The ad attributed racial prejudice to the plaintiff, W. Bedford Moore, III, a white professor at the University of Virginia, in the context of a local public zoning controversy regarding a housing development tha Mr. Fleming intended to construct in Albemarle County next to Mr. Moore's property.

This Court is well familiar with the facts and procedural history of this case. Mr. Fleming has maintained at all stages of this litigation that the statements contained in his paid advertisement are constitutionally protected expressions of opinion and that the award of

damage against him was excessive as a matter of law in light of the absence of any proof of damage by Moore.

. . .

upon which to distinguish the two examples. Thus, a failure to reconsider whether Mr. Fleming's statements are protected expressions of opinion will deny him the constitutional protections and privileges that are rightfully his.

B. The Remitted Compensatory And Punitive Awards Remain Excessive

Although the Chaves decision did not specifically address the questions of the excessiveness of damages, that decision nevertheless casts an important light on this issue in the context of a defamation action. Just as the circumstances in which a statement is made must be examined to determine whether a statement is a constitutionally protected expression of opinion,

those same circumstances must be examined to determine whether a damage award is so excessive as to infringe unacceptably on the right of free speech.

A defamation action is a unique and sensitive form of litigation because of the necessary balance that the courts must maintain between the inalienable right to speak one's mind and the right of individuals to live free from defamatory acusations. Any defamation judgment, for any amount, infringes on the free speech guarantees embodied in both the United States and Virginia Constitutions. Some infringement is tolerated in order to protect against statements that do actually defame; yet, such infringement must be tolerated cautiously and reluctantly. Otherwise, the free expression of ideas is rendered impotent through inhibition.

Supreme Court, U.S.
FILED
JUN 26 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-2168

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

JAMES N. FLEMING,

Petitioner,

v.

W. BEDFORD MOORE, III,

Respondent.

MOTION FOR LEAVE TO FILE NAACP AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER'S BRIEF FOR WRIT OF CERTIORARI

Grover G. Hankins,
General Counsel,
Charles E. Carter,
Associate General Counsel,
Everald Thompson,
Assistant General Counsel,

NAACP,
4805 Mt. Hope Drive,
Baltimore, Maryland 21215,
(301) 358-8900

NO. 85-2168

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1985

JAMES N. FLEMING,

Petitioner,

v.

W. BEDFORD MOORE, III,

Respondent.

MOTION FOR LEAVE TO FILE NAACP AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER'S BRIEF FOR WRIT OF CERTIORARI

NOW COMES THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, and respectfully moves this Honorable Court for permission to file the attached amicus curiae brief in the

above captioned case.

Respondent has declined to grant the NAACP's request for consent to file an amicus curiae brief.

Petitioner has granted the NAAPC's request for consent to file the attached amicus curiae brief.

For seventy-four years the NAACP has been the foremost advocate of the rights of black and minority peoples in this country.

The use of peremptory challenges to exclude blacks from juries in civil trials is of paramount concern to the NAACP. The attached amicus curiae brief requests that this Court curtail the use of peremptory challenges to exclude blacks in cases where race is the subject of the controversy or where the interests of black litigants are at stake.

Despite criticisms of "judicial paternalism", this Court historically has acted to

uphold the constitutional rights of blacks and other minorities. The issue presented in the attached amicus curiae brief illustrates that there is continued need for the Court's vigilance in protecting the rights of these groups.

Exclusion of blacks from civil juries on racial grounds sullies the integrity of the judicial process. Failure by this Court to establish guidelines limiting the use of the peremptory challenge in the circumstances mentioned above will further embolden those who manipulate the peremptory device to attain racist judgments.

Accordingly, the NAACP respectfully requests that this Court grant permission to file the attached amicus curiae brief.

Respectfully submitted,

GROVER G. HANKINS, ESQ.
General Counsel
CHARLES E. CARTER, ESQ.
Assoc. General Counsel
EVERALD THOMPSON, ESQ.
Asst. General Counsel
NAACP
4805 Mt. Hope Drive
Baltimore, Md. 21215
(301) 358-8900

(8)

NO. 85-2168

FILED
SEP 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JAMES N. FLEMING,

Petitioner,

v.

W. BEDFORD MOORE, III,

Respondent.

On Writ of Certiorari
to the Supreme Court of Virginia

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Thomas E. Albro, Esq.
SMITH, TAGGART, GIBSON & ALBRO
105-109 East High Street
Post Office Box 1585
Charlottesville, VA 22901
(804) 977-4455

Counsel for Respondent

APPELLATE PRINTING SERVICES, INC., HERITAGE BLDG., RICHMOND, VA (804) 643-7789

15pp

QUESTIONS PRESENTED FOR REVIEW

1. Does this Court have jurisdiction to consider the issues raised in Petitioner's questions 1, 3 and 4 when those issues were decided by the Supreme Court of Virginia in June, 1984 and February 1985 and this Court has twice refused to grant certiorari to review those decisions and questions?

2. Should certiorari be granted to a Petitioner who has distorted and fabricated the factual record on appeal in violation of Supreme Court Rule 21.5?

3. Has the First Amendment been violated by a libel judgment in which Respondent proved injury to his reputation and was awarded $66,666.67 in compensatory damages and Petitioner, a millionaire, was found to have acted with actual malice and was ordered to pay $166,666.67 in punitive damages?

4. Should the rule enunciated in Batson v. Kentucky, 106 S. Ct. 1712, 90 L. Ed. 2d 69,

No. 84-6263 (1986) be extended to jury selection in all civil petit jury trials, in the absence of any statutory or constitutional provision to that effect?

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Table of Authorities	v
Opinions Below	2
Statement of Jurisdictional Grounds	2
Constitutional and Statutory Provisions Involved	5
Statement of Case	6
Argument	
I. **THIS COURT DOES NOT HAVE JURISDICTION OVER THE MATTERS RAISED IN PETITIONER'S QUESTIONS 1, 3 and 4 BECAUSE THEY WERE DISPOSED OF BY ORDERS OF THE SUPREME COURT OF VIRGINIA IN JUNE, 1984 AND FEBRUARY, 1985, AND THIS COURT HAS TWICE DENIED CERTIORARI TO THOSE DECISIONS.**	24
II. **THE PETITION SHOULD BE DENIED PURSUANT TO SUPREME COURT RULE 21.5 BECAUSE PETITIONER HAS FAILED TO ACCURATELY PRESENT THE FACTS ESSENTIAL TO A READY AND ADEQUATE UNDERSTANDING OF THE POINTS REQUIRED FOR CONSIDERATION.**	25

Page

III. THERE IS NO VIOLATION OF THE FIRST AMENDMENT WHEN RESPONDENT WAS ORDERED TO REMIT A SUBSTANTIAL PORTION OF HIS COMPENSATORY AND PUNITIVE AWARDS, HE ACCEPTED REMITTITUR IN THE TRIAL COURT WITHOUT PROTEST, THAT REMITTUR WAS AFFIRMED ON APPEAL AND THE AMOUNTS AWARDED FAIRLY COMPENSATE HIM FOR INJURY TO REPUTATION AND FAIRLY PUNISH PETITIONER'S FALSE AND MALICIOUS LIBEL. 25

IV. THERE IS NO STATUTORY OR CONSTITUTIONAL PROVISION WHICH WOULD AFFORD PETITIONER A RULE SUCH AS THAT ENUNCIATED IN BATSON V. KENTUCKY, 106 S. Ct. 1712, 90 L. Ed. 2d 69, NO. 84-6263 (1986). 50

Conclusion 58

Appendix 61

TABLE OF AUTHORITIES

Cases:	Page
Batson v. Kentucky, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986)	50, 51, 52, 53, 54, 57
Bindrim v. Mitchell, 92 Cal. App. 3d 61, 155 Cal. Rptr. 29, cert. denied, 444 U.S. 984, 100 S. Ct. 490, 62 L. Ed. 2d 412 (1979)	37, 38
Bose Corp. v. Consumers Union of the United States, Inc., 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984)	24
Burnett v. National Enquirer, Inc., 144 Cal. App. 3d 991, 193 Cal. Rptr. 206 (1983), appeal dismissed, 465 U.S. 1014, 104 S. Ct. 1260, 79 L. Ed. 2d 668 (1984)	38
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975)	4
Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 105 S. Ct. 2939, 86 L. Ed. 2d 593 (1985)	39
Fleming v. Moore,, Record No. 84-382, cert. denied, 105 S. Ct. 366, 83 L. Ed. 2d 302 (1984)	3

Cases:	Page
Fleming v. Moore, Record No. 84-1740, cert. denied, 105 S. Ct. 3513, 87 L. ED. 2d 643 (1985).....	3, 4, 50
Fleming v. Moore, 780 F.2d 438 (4th Cir. 1985), Record No. 85-1532, cert. denied, 106 S. Ct. 1644, 90 L. Ed. 2d 189 (1986).....	3, 55, 56
The Gazette, Inc. v. Harris, 229 Va. 1, 325 S.E.2d 713 (1985).....	3, 4, 24, 46, 47, 48
Gertz v. Robert Welch, Inc., 418 U.S. 323 , 94 S. Ct. 2997, 41 L. ED. 2d 789 (1974).....	27
Gertz v. Robert Welch, Inc., 680, F.2d 527 (7th Cir. 1982), cert. denied, 459 U.S. 1226, 103 S. Ct. 1233, 75 L. Ed. 2d 467 (1983).....	33. 34
Giant of Virginia, Inc. v. Pigg, 206 Va. 679, 152 S.E.2d 271 (1967).....	45
Harmon v. Cundiff, 82 Va. 239 (1886).....	46

Cases: **Page**

Macon Telegraph Pub. Co. v. Elliott, 165 Ga. APp. 719, 302 S.E.2d 692, cert. vacated, 251 Ga. 544, 309 S.E.2d 142 (1983), cert. denied, 466 U.S. 971, 104 S. Ct. 2343, 80 L. Ed. 2d 817 (1984)..... 36

Marcone v. Penthouse International, Ltd., 577 F. Supp. 318 (E. D. Pa. 1983), rev'd on other grounds, 754 F. 2d 1072 (3d Cir.), cert. denied, 106 S. Ct. 182, 88 L. Ed. 2d 151, rehearing denied, 106 S. Ct. 548, 88 L. Ed. 2d 477 (1985)..... 40, 41, 42

McHale v. Lake Charles American Press, 6 Med. L. Rptr. 2478 (La. Ct. App. 1980)..... 37

Melton v. Bow, 241 Ga. 629, 247 S.E.2d 100, cert. denied, 439 U.S. 985, 99 S. Ct. 576, 58 L. Ed. 2d 656 (1978)..... 36, 37

Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 213 Va. 377, 192 S.E.2d 737 (1972), rev'd on other grounds, 418 U.S. 264, 94 S. Ct. 2770, 41 L. Ed. 2d 745 (1974)..... 46

Selby v. Savard, 134 Ariz. 222, 655 P.2d 342 (1982)..... 35

STATUTES AND COURT RULES:

Rule 21.5..... 25

28 U.S.C. § 210(c) (1982)..... 5

28 U.S.C. § 1257 (1982)..... 4

42 U.S.C. §§ 1981 et. seq. (1982)..... 55

U. S. Const. amend. VI (1982)..... 53

U. S. Const. amend. VII (1982)..... 53

VA. CODE ANN. § 8.01-359(B) (1977)..... 58

No. 85-2168
IN THE UNITED STATES SUPREME COURT
OCTOBER TERM, 1985

JAMES N. FLEMING,

Petitioner

v.

W. BEDFORD MOORE, III

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Respondent, W. Bedford Moore, III (Moore) respectfully prays that the petition for writ of certiorari of Petitioner, James N. Fleming (Fleming), be denied on the grounds that the issue raised in the second question presented in his petition is neither novel nor important for decision by this Court, and that this Court does not have jurisdiction to consider the remaining questions raised in the petition.

OPINIONS BELOW

Moore rejects Fleming's assertion that the questions presented in his petition were finally resolved by the Supreme Court of Virginia on January 24, 1986 and that all earlier orders and opinions were merely interlocutory. Fleming's references to the dates of various orders and opinions and their subject matter are correct.

STATEMENT OF JURISDICTIONAL GROUNDS

The petition for certiorari was not timely filed to preserve questions 1, 3 and 4 for review by this Court and this Court does not have jurisdiction over them. Fleming seeks certiorari to review the judgment of the Supreme Court of Virginia entered on January 24, 1986. None of the matters raised in questions 1, 3 or 4 of the petition was the subject of that decision. The only questions presented by Fleming to the Supreme Court of Virginia in that appeal related exclusively to whether the trial court had ordered a sufficient remittitur of the jury award as mandated by the

Supreme Court of Virginia (App. A). The issues raised in questions 1, 3 and 4 have been the subject of three other petitions for certiorari filed by Fleming. They have all been raised, in one form or another, in Fleming v. Moore, Record Nos. 84-382, 84-1740 and 85-1532. Certiorari has been denied in each case. Fleming v. Moore, Record No. 84-382, cert. denied, 105 S. Ct. 366, 83 L. Ed. 2d 302 (1984); Fleming v. Moore, Record No. 84-1740, cert. denied, 105 S. Ct. 3513, 87 L. Ed. 2d 643 (1985); Fleming v. Moore, Record No. 85-1532, cert. denied, 106 S. Ct. 1644, 90 L. Ed. 2d 189 (1986).

Fleming has conceded that all of his federal constitutional issues were presented to the Circuit Court of Albemarle County and the Supreme Court of Virginia in an appeal decided on February 1, 1985. See, Fleming v. Moore, sub. nom. The Gazette, Inc. v. Harris, 229 Va. 1, 325 S.E.2d 713 (1985). He also conceded that when the Supreme Court of Virginia affirmed his liability in Fleming v. Moore it was a final ruling on the federal consti-

tutional issues he raised in the state court proceedings. See Petition for Writ of Certiorari, Record No. 84-1740 (p. 1). Moore agreed with that statement of jurisdictional grounds in his brief in opposition. See Brief in Opposition to Petition for Writ of Certiorari, Record No. 84-1740 (p. 1). The February 1, 1985 judgment of the Supreme Court of Virginia finally adjudicated every substantive issue in this case. All constitutional and common law issues were decided, leaving only the matter of remittitur open on remand to the trial court. 229 Va. at 49, 325 S.E.2d at 745. Fleming properly petitioned for certiorari to that decision. See Record No. 84-1740. It was a final judgment under 28 U.S.C. § 1257 (1982) because the federal issues in the case would survive any possible outcome of the remittitur proceedings and would require resolution by this Court. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 480-481, 95 S. Ct. 1029, 1038-39, 43 L. Ed. 2d 328 (1975). Even if one were to argue that the June 7, 1984

and February 1, 1985 adjudications of the constitutional questions by the Supreme Court of Virginia might not have been final, the fact is that Fleming petitioned this Court three times seeking review of these issues, briefing them fully each time, and raising most every conceivable argument in support of his positions. He has had his day in court. Surely, there must be an end to this process sometime, despite Fleming's demonstrated willingness to litigate ad infinitum.

The instant petition represents Fleming's fourth attempt to persuade this Court to take his case on these issues and it comes too late under the statutory provisions governing the jurisdiction of this Court. 28 U.S.C. § 210(c) (1982). This Court should give no consideration whatever to the issues raised in questions 1, 3 and 4 of Fleming's petition for certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Moore adopts Fleming's statement of these provisions.

STATEMENT OF THE CASE

Moore rejects Fleming's statement of the case. The facts set forth by Fleming are distorted, misleading and in some instances false. Fleming similarly distorted the record in his petition for certiorari in Record No. 84-1740. In the nine-year history of this litigation, Fleming has had, at various times, 18 different attorneys appear on his behalf, only five of whom (not including his present counsel of record) appeared at either of the two trials of this case. While this may explain the gross inaccuracies and distortions in Fleming's statement of the case, it does not excuse them. To correct the record, Moore submits the following statement of the case.

Moore has taught humanities at the University of Virginia since 1947 and resides in a racially integrated area of Albemarle County, Virginia, where he has enjoyed cordial relations with his black neighbors. His property shares a common border with a 128-acre parcel on the Rivanna

Reservoir known as Evergreen, owned by Fleming and three white business partners. The reservoir is the principal water supply for more than 30,000 area residents. In October, 1974 Fleming and his white partners filed a special use permit application to build 804 housing units on the Evergreen site (Evergreen I). The land was not zoned for this size development and the housing could not be built as a matter of right (Tr. 307-08, 315, 334).[1] There is no record of Fleming ever "expressly announcing" that he would sell to blacks and whites as he now asserts (Pet. 5), and Fleming cites nothing in the record for this naked assertion.

Moore knew nothing of the Evergreen plan until he was routinely notified by the county as an adjoining landowner of a site plan conference in November, 1974. At that meeting, Moore spoke with Fleming about the possibility of purchasing

---

[1]References to the trial transcript are indicated as follows: "(Tr.)". References to plaintiff's exhibits are indicated as "(PX)" and defendant's exhibits as "(DX)". References to the instant petition for certiorari are indicated as "(Pet.)".

a small fraction of an acre of land where Moore's driveway meets the public road, a subject they had discussed several years earlier (Tr. 65). However, after reviewing plans for this massive development, Moore realized he would be opposed to it. Thinking it would be dishonorable to negotiate privately with Fleming for the property at his driveway while publicly opposing the development, Moore wrote Fleming a short, polite letter to that effect (PX 4).

Pollution, not race, was the overwhelming issue in the Evergreen matter until Fleming and his attorney, Jeroyd X. Greene, vigorously injected racism into the two hearings the County Board of Supervisors held on Evergreen I (Tr. 182-188, 279, 193-99, 290; DX 4; PX 9). Fleming correctly states that charges of racism permeated the dispute (Pet. 5); he generated 99% of them and never proved any of them as to Moore. Although the county planning staff recommended approval

of Evergreen I, Fleming did not wait for the supervisors to meet or to express any opinions on the project before bringing race into the matter. Prior to the supervisors' first hearing he sent every member of the board a letter captioned "THE TRUE FACTS" in which he raised racial bias as an issue (DX 4). He brought Mr. Greene to that hearing and together they made racism an issue (DX 4). Serious and legitimate concerns relating to pollution of the reservoir were raised at the hearing by many persons and organizations, including the black mayor of Charlottesville, the chairman of the Rivanna Water and Sewer Authority, the executive director of the Piedmont Environmental Council, a member of the Virginia House of Delegates, the League of Women Voters, various citizens' and sportsmen's groups, professors of urban planning and engineering at the University of Virginia, a pollution control specialist for the State Water Control Board, and others, including Moore.

Moore's public opposition to Evergreen was brief and insignificant. Fleming distorts and misrepresents the record in an effort to convince this Court that Moore was a leader of opposition forces in the Evergreen matter; nothing could be further from the truth. Moore did not organize any efforts against Evergreen. He was neither an officer nor a director of any of the numerous citizens organizations that opposed Evergreen. He gave no interviews and made no statements to the press about Evergreen. As Moore put it, "I simply opposed it on my own account" (Tr. 73-74).

The first Evergreen plan was proposed in October, 1974 and defeated by the Board of Supervisors in January, 1975. A second Evergreen plan (Evergreen II)—the only plan relevant to Fleming's petition for certiorari—was filed in November, 1975. Fleming published his libel in January, 1976, a few days before the supervisors defeated the second plan. During that entire 16-month period, Moore spoke no more than three times and never

spoke for more than a few minutes. During the time the county considered Evergreen II, Moore spoke only once, and that was from his seat in the audience merely to respond to a personal attack from Fleming's attorney. He did not speak on his own initiative, nor did he speak to the merits of the second Evergreen plan.

It is important to note that Moore never "took the rostrum" except in response to personal attacks on him by Fleming or Fleming's attorney. Moore only spoke up to set the record straight after being insulted or goaded by Fleming. Fleming now portrays these brief and generally defensive remarks as being the vanguard of the opposition to Evergreen, an assertion that is as unsupported as it is preposterous.

Moore did not become identified in the public eye as a leader of the opposition to Evergreen. Fleming now argues he led the opposition and quotes Moore's attorney's trial testimony out of context on this issue (Pet. 9). When questioned

by Fleming's counsel at trial on this subject, Moore's attorney during the Evergreen controversy stated:

> I don't think the public knew about it. Perhaps people that attended those meetings might have seen him. But his name in a public sense might have appeared in the newspaper once or twice in three years. (Tr. 289).

Not surprisingly, Fleming never bothers to advise this Court of the enormous and legitimate public sentiment against Evergreen and the many individuals and organizations who, unlike Moore, did play significant roles in preventing the rezoning of the Evergreen tract (Tr. 295-98, PX 8, 9, 10, 11, 12, 13, 17, DX 1, 4, 8).

Fleming states the supervisors asked Moore to meet with Fleming because they "regarded Moore as one of the principal opponents of the project" (Pet. 10). Fleming fails to note this request was made four months after Fleming libeled Moore and the supervisors made their request because it related to a matter affecting Moore's land, not because they regarded him as leader of any opposition (PX 17). This distortion and half-truth

is typical of Fleming's petition. Fleming's statement of facts might lead this Court to conclude Moore's opposition was the sole, proximate cause of the defeat of the plans. This assertion is groundless.

Fleming now makes much of two offensive remarks attributed to one supervisor which came to light in testimony at an unrelated trial in April, 1976—fully three months after Fleming libeled Moore in his paid advertisement (Pet. 6-8). Fleming never suggests Moore had any connection with this supervisor or his remarks. They formed no part of his libelous advertisment. However, the supervisor's alleged statements are as shocking and vile as they are irrelevant to this case. Moore can only surmise Fleming has injected them into this case—for the first time in this litigation's nine year history—as part of his last-ditch effort to obtain certiorari at any cost.

In 1975, local governments responsible for the reservoir implemented plans to study protection and reclamation measures. As the community's

chief source of drinking water the reservoir has been a public concern of local governments since 1971 (Tr. 350-52). In June and July, 1974, before Evergreen I, the supervisors, Charlottesville city council and planning district commission received evidence regarding pollution, agreed the reservoir was in serious danger of eutrophication from runoff from housing development and other human activities in the watershed and appointed a public panel to study measures to address the problem (Tr. 298-99, 343-45, 350-52; PX 10, PX 11, PX 13). The environmental concerns regarding the reservoir were not a sham concocted to defeat Evergreen (Tr. 308-09). In the summer of 1975 the panel recommended and the local governments retained professional consultants to study the pollution problem and propose solutions (Tr. 301-02, 321-22). Fleming had knowledge of this action. Also, the Albemarle County soil erosion and sedimentation ordinance was amended that summer to preserve the reservoir (Tr. 343-44). Ultimately,

all land in the watershed was downzoned to address pollution problems (Tr. 318-19).

In November, 1975, Fleming hastily filed his plans for Evergreen II after a group of conservation-minded supervisors were elected to take office on January 1, 1976; protection of the reservoir had been a central issue in that campaign (Tr. 434). Environmental concerns were again raised, this time bolstered by an exhaustive study of pollution of the reservoir (Tr. 301-02, 321-22) and an amended local soil erosion ordinance to preserve the reservoir (Tr. 343-44). Fleming's second Evergreen plan, like the first, failed to address the county's water pollution concerns (Tr. 198-99, 295-305, 342-43, 345-46, PX 9, DX 1).

Fleming states that the Board of Supervisors voted to impose a moratorium on construction in the "area in issue" on January 14, 1976 and this incited him to publish his libelous advertisements on January 15 and 16, thus "triggering" the

instant litigation (Pet. 11). Fleming has concocted these "facts" especially for this Petition. In truth, Fleming testified he began drafting his libel about five weeks earlier in December, 1975 when the Planning Commission deferred a vote on Evergreen II (Tr. 220). The new, pro-conservation supervisors were set to take office in January, 1976 and Fleming knew the Commission's deferral meant Evergreen II would be voted on by them, not the lameduck supervisors he had sued in federal court (Tr. 220-21; DX 1). It is not true the building moratorium effectively rejected Evergreen II (Pet. 11) and there is nothing in the trial record to support this. Indeed, Fleming cites "App. 192-194" as support for these "facts" (Pet. 11) but those pages of testimony do not even refer to the same subject matter. In fact, the Planning Commission recommended approval of the project on January 13, 1976 (Tr. 336) but Fleming, as with Evergreen I, injected race before the supervisors voted. They voted against the project several days after the libel

was published. Again, Fleming employs untruths and half-truths to manufacture a record to bolster his case.

Fleming published his libelous attack in the student newspaper of the University of Virginia where he knew Moore made his livelihood (Tr. 224-28). Fleming acknowledged he believed university students would respond to a racially-motivated appeal since, "[w]henever you talk of racism they show a certain amount of interest, the better type of students show a certain amount of interest" (Tr. 229).

Fleming's accusations of racist belief and racist activity on the part of Moore were utterly false. Moore and several witnesses proved he was not a racist. Evidence showed Moore had been raised to abhor racism and had never said or done anything that could be construed as racist. Fleming produced no evidence at trial tending to suggest there was any truth to his defamatory charges.

Despite the falsity of his charges of racism, Fleming characterizes his charges as mere opinion and suggests that he "believed" Moore was a racist. Fleming's testimony in this regard, as in most respects at the second libel trial, was inherently incredible. He was impeached on the stand with his own prior sworn testimony twenty-five times (Tr. 177-78, 180-81, 191-92, 193, 202-03, 203-04, 208-09, 219, 225, 225-26, 227-28, 228-29, 230-31, 232-33, 233-34, 238, 395, 398-401, 401, 402, 401-04, 404, 418, PX 14, and PX 15).

It is not surprising Fleming quickly glosses over the evidence at trial, trivializing it and suggesting both sides produced substantial evidence to support their contentions (Pet. 14-15). Fleming attempted to prove his factual allegations of racism against Moore and failed miserably. The record shows that prior to January 15 and 16, 1976 when the libel appeared, there was no information from which Fleming deduced Moore was a racist.

Fleming testified he believed he was treated differently than white developers and Moore was not concerned with development by white people around the reservoir (Pet. 12). He alleged the county imposed conditions on Evergreen it did not require of white developers (Pet. 5), and that Moore and others who opposed Evergreen did not oppose white developers near the reservoir.

Fleming used two developments near the reservoir for comparison: Panorama and Ivy Farms. However, unlike Evergreen, these projects were zoned for their proposed densities and did not require rezoning, and Fleming, an expert real estate developer and appraiser, was aware of this (Tr. 307, 325, 334, 487-489). They only required site plan approval (Tr. 315). Further, Fleming never cited a single instance known to him before his libel was published in which any developer, white or black, obtained a rezoning near the reservoir such as Evergreen required.

Fleming conceded he had not attended many meetings where the county considered other developments around the reservoir, either before or contemporaneously with Evergreen, nor did he have much knowledge about the nature of any public opposition to developments proposed by whites (Tr. 195-97). Indeed, the fact that projects developed by whites were approved (regardless of their zoning) was essentially the only basis he had for concluding he was the victim of racism (Tr. 195, 197, 218-19).

By his own admission, his familiarity with other developments was scanty at best. He never testified to any personal knowledge of conditions attached to other developments. Nevertheless, the county planning staff recommended approval of both Evergreen I and Evergreen II with conditions. The chief reason Fleming's plans were rejected was that he never satisfied the environmental concerns of the staff and supervisors and his engineer did not address them in the second Evergreen plan (Tr. 198-99, 295, 305. 341-43, 345).

Fleming knew absolutely nothing about whether Moore did or did not oppose other developers. Before Fleming published his advertisement he had no information to suggest that Moore failed to oppose other developments around the reservoir. He was impeached with his prior sworn testimony when he stated at trial that the developer of Ivy Farms told him Moore did not oppose that development, and then admitted he had not talked to the developer (Tr. 202-03). He also conceded that he did not know whether Moore opposed Panorama because Fleming never talked to its developer about Moore's opposition or lack of it regarding Panorama (Tr. 203-04).

Fleming repeatedly testified hypothetically regarding Moore and others who opposed Evergreen, stating they would be racists if they had not opposed white developers (Tr. 194-95), but adding he did not know that they did not oppose those developers (Tr. 195-97). Indeed, he undoubtedly knew otherwise. He was told specifically that opposition to Ever-

green was not unique at the very first meeting of the board of supervisors on Evergreen I on January 22, 1975. Marsha Mashaw of the League of Women Voters responded directly to Fleming's and his attorney's charge that white developers had not faced opposition around the reservoir (DX 4):

> I would also like to add something that is not in my statement, but that is in response to something that was said earlier. That is, as you, the members of the Board of Supervisors know, the League of Women Voters has appeared before you many times either to speak for or against petitions, special permits, and zoning requests which have been before you. We have consistently opposed high density zoning around the Reservoir. We have been advocating conservation zoning for several years around the Reservoir and I might add that one of our Vice-Presidents has not been too happy about this. But this is a policy of our Board, and we have been before you many times. I think your record will also show that we opposed the Hollymead development mainly because it was not going to have any low cost housing in it. I think the record will also show that whenever any large developments have come before you one question that the League has consistently asked is what are going to be the provisions for low and

> moderate income people. So, I think it is unfair to say that the people who are before you tonight are here only for this particular instance and have never been before you at other times. Thank you. (DX 4).

At trial, Fleming repeatedly referred to the approval of Panorama by the county (Tr. 186, 194, 196-97) and asserted it was built (Tr. 194), but his own witness, supervisor Chairman Gerald Fisher, established that Panorama had not received county approval and was never built (Tr. 436-38). Fisher also established as part of Fleming's case in chief that race played no part in the county's treatment of Evergreen (Tr. 458-59).

In summary, Fleming's best hope of having his case heard on appeal is through shocking distortions of the trial record and the history of the case. Fleming cannot rest his petition on the facts as they actually exist; he knows certiorari will be denied. He creates, therefore, a fairy tale consisting of half-truths, innuendo and lies, much to the same effect as his testimony at trial during which he was impeached twenty-five times.

ARGUMENT

In accordance with Bose Corporation v. Consumers Union of the United States, Inc., 466 U.S 485, 104 S. Ct. 1949, 80 L. Ed. 2d 502, (1984), the Virginia Supreme Court conducted an independent examination of the entire record in order to ensure that the judgment of the trial court did not constitute a forbidden intrusion on the exercise of free expression. 229 Va. at 43-49, 325 S.E.2d at 742-44. Moore submits that upon such an examination this Court will also conclude there has been no intrusion on the exercise of free expression by the trial court.

I. THIS COURT DOES NOT HAVE JURISDICTION OVER THE MATTERS RAISED IN PETITIONER'S QUESTIONS 1, 3 AND 4 BECAUSE THEY WERE DISPOSED OF BY ORDERS OF THE SUPREME COURT OF VIRGINIA IN JUNE, 1984 AND FEBRUARY, 1985, AND THIS COURT HAS TWICE DENIED CERTIORARI TO THOSE DECISIONS.

Respondent's argument and authority in support of this section of the brief is found in the Statement of Jurisdictional Grounds (supra, pp. 2-6).

II. THE PETITION SHOULD BE DENIED PURSUANT TO SUPREME COURT RULE 21.5 BECAUSE PETITIONER HAS FAILED TO ACCURATELY PRESENT THE FACTS ESSENTIAL TO A READY AND ADEQUATE UNDERSTANDING OF THE POINTS REQUIRING CONSIDERATION.

As Moore's Statement of the Case makes clear, Fleming has deliberately distorted the factual record below and has fabricated certain aspects of it in an effort to have certiorari granted in this case. Such conduct should not be rewarded.

Respondent submits that such inaccuracy and distortion of the record is sufficient reason for denying the petition, pursuant to Rule 21.5, and the Court is urged to do so.

III. THERE IS NO VIOLATION OF THE FIRST AMENDMENT WHEN RESPONDENT WAS ORDERED TO REMIT A SUBSTANTIAL PORTION OF HIS COMPENSATORY AND PUNITIVE AWARDS, HE ACCEPTED REMITTITUR IN THE TRIAL COURT WITHOUT PROTEST, THAT REMITTITUR WAS AFFIRMED ON APPEAL AND THE AMOUNTS AWARDED FAIRLY COMPENSATE HIM FOR INJURY TO REPUTATION AND FAIRLY PUNISH PETITIONER'S FALSE AND MALICIOUS LIBEL.

Fleming argues, without supporting facts, that he was punished by the jury for daring to voice an unpopular view that has "been of unique popularity in that region" for centuries (Pet. 48). One wonders what this unspecified "view" was and what evidence there is that the jurors punished him for holding it. However much one chooses to live in the past, the reality is that racism is unpopular today and that the perpetrators of racism are far more likely to be punished for their behavior in this country than the victims of racism. The trial court made this quite clear on April 21, 1983 in refusing to set aside the verdict:

> We deny the motion to set aside the jury verdict and to grant a new trial. The jury is the conscience of the community. Apparently this was a jury that felt strongly about the curse of racism and wished to make a strong statement about the unjustified use of the epithet of racism (Tr. 1003).

It was Moore who was the victim of racism in this case, not Fleming. It was Moore whose reputation was injured and who suffered the emotional strain of being publicly branded a racist in the

community in which he had made his livelihood for three decades. Considering the evidence adduced at trial and the subsequent modification in the amount of the verdict in the Virginia courts, there is no basis for granting certiorari. Justice White did indeed state in Gertz v. Robert Welch, Inc., 418 U.S. 323, 397-98, 94 S. Ct. 2997, 3035, 41 L. Ed. 2d 789 (1974) (White, J., dissenting), that "immoderate verdicts" should be corrected on a case by case basis upon examination of the whole record. This, in fact, was done by the Supreme Court of Virginia on February 1, 1985 when it directed the trial court to order a remittitur of the jury verdict. At the time the Supreme Court of Virginia took that action, the verdict had a value of approximately $700,000, consisting of an award of $100,000 for compensatory damages, $250,000 for punitive damages and prejudgment interest which ran from the date of the libelous publications in 1976. The trial court remitted both the compensatory and punitive awards, and

refused to award prejudgment interest, resulting in a total award to Moore of $233,333.33. Moore accepted this remittitur without protest. The Supreme Court of Virginia reviewed the trial court's remittitur order and upheld it. Consequently, the original jury verdict has now been reduced by 66% as a result of state court proceedings. There is no basis for the federal courts to reconsider this matter now.

Fleming belittles the injuries his libelous publication caused Moore (Pet. 15), but the evidence at trial supports the amount of the compensatory award as remitted. Moore suffered stress, embarrassment and humiliation and feared for his reputation. Moore testified he was "seriously upset" to have a man he disagreed with in public "go around behind me and put into the University student newspaper such a malicious attack on me, my character. This was done in front of my colleagues at the University, students, black and white. I felt it put a gap in my honor that could

only be restored by vindication by my fellow citizens on this jury." (Tr. 89-90) Fleming's libelous advertisement appeared twice in the student paper which had a circulation of 16,500 and was read throughout the community (Tr. 167)

Moore's colleague of 24 years, Luther Gore, corroborated Moore's testimony, stating Moore was "very shocked at the claims being made in the ad" and he seemed distressed. (Tr. 358) "[H]e felt that it, of course, went very much against what he stood for in his teaching career." (Id.) Additionally, Gore offered the following testimony:

> Q. Let me ask you this way, in terms of Mr. Moore's reaction to the ad, did he ever subsequently express any feelings, any continued feelings about his feelings respecting the ad that were first expressed when the ad came out?
>
> A. I'm sorry...
>
> Q. Did he continue to express any feelings of shock or what have you with respect to the ad?
>
> A. From time to time, yes.
>
> Q. All right, sir. Did you receive any reaction from colleagues or students at the time the ad came out with respect to the ad?

A. Yes, I think a good many people were shocked and surprised that the charges were being made.

(Tr. 358-59)

Bernard P. Chamberlain, an attorney who testified that he had been closely acquainted with Moore since Moore's early days as a professor, said that Moore was "outraged" by Fleming's advertisement. (Tr. 163) "Mr. Moore was very upset by it," Chamberlain said, adding, "...he was afraid it was going to have an effect on his friends, an effect on his students...he felt [it] was a terrible wrong." (Tr. 163)

William A. Elwood, a University professor and former Assistant to the President of the University for Affirmative Action, said that several undergraduate students had asked him about the person mentioned in Fleming's advertisement. (Tr. 355-56) Elwood testified that an inquiry had been made by the black associate dean of student affairs. Id. The associate dean told Elwood that he had received many questions about the

advertisement. Elwood said that some faculty members also made inquiries. Id. Additionally, Moore testified that he knew of inquiries made "by those who didn't know me that were black, that is, some graduate students and undergraduates made inquiries to other people." (Tr. 91)

Moore testified that the defamation affected his teaching by altering his attitude toward his material and his students. (Tr. 90) The advertisement made him self-conscious about his race in a way he deplored, citing, for example, changes he made in the method of teaching the writings of William Faulkner. This Court must also consider the racial climate at the University during January, 1976 in judging the defamation's impact. Both Moore and former University President Edgar F. Shannon testified that the intensity of racial tensions peaked in the 1975-76 academic year. (Tr. 92, 248-50) The timing of the libel could not have been more devastating for a University professor. In short, the advertisement undermined

the ease with which Moore was able to conduct himself in the academic community. As Mr. Shannon noted, the perceived racial attitudes of a University professor "can make a good deal of difference in terms of the ... atmosphere in the classroom involving the white students as well as the black students..." (Tr. 251)

Moore said the appearance of the advertisement in the University newspaper was of particular concern since it was printed during the height of the so-called Farmington Country Club flap. "[I]t was very awkward indeed because Frank Hereford had just come to the Presidency and was under a heavy challenge...They were raising the question of Farmington's racial policy, discriminatory policy, and Mr. Hereford's membership..." (Tr. 92) Moore testified he had never belonged to Farmington Country Club. (Tr. 93)

Summarizing the injury he suffered, Moore said "It is not an experience I would visit on most people. It's very unhappy." (Tr. 94) Moore said

he experienced and continued to experience stress, embarrassment and humiliation "very keenly" and "I don't think it has lessened any. It still stings. I still feel my honor has been questioned, that's not something you shrug off easily." (Tr. 149-50) The Supreme Court of Virginia found that "[c]learly Moore suffered damage to his reputation, embarassment, humiliation and mental suffering from this defamatory publication..." 229 Va. at 48, 325 S.E.2d at 745.

> Testimony showed that Moore was "very upset" by the publication and felt he had experienced "a terrible wrong." The evidence showed that other faculty members at the University as well as students made repeated inquiries about Moore and whether the statements in the items were true.

Id. at 47, 325 S.E.2d at 744.

The size of the compensatory award--$66,666--is in proportion with verdicts from other jurisdictions involving injury to reputation, embarassment, stress and humiliation, where evidence of damage was difficult to measure precisely. In the retrial of Gertz v. Robert Welch,

Inc., 680 F.2d 527 (7th Cir. 1982), cert. denied, 459 U.S. 1226, 103 S. Ct. 1233, 75 L.Ed. 2d 467 (1983), the Court of Appeals affirmed a jury verdict of $100,000 in compensatory and $300,000 in punitive damages. The action was brought against the publisher of an article in which Gertz, an attorney, was described as a "communist-fronter," a "Leninist" and a "Marxist." On appeal, defendant argued that the compensatory award was improper because there had been no proof of actual injury. The court held that "Gertz has proved actual injury in this case. Gertz testified to severe mental stress, anxiety and embarassment which he suffered as a result of the article. Several attorneys testified at trial that calling a lawyer a communist would be highly injurious to a professional reputation." Gertz, 680 F.2d at 540. The Court noted that one witness testified at trial that he had heard the defamatory statements about Gertz repeated, Id., not unlike the instant case. The Seventh Circuit summarized thusly:

> The Supreme Court has recognized that actual injury in defamation cases is not solely measured by out-of-pocket economic loss. "Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation and mental anguish and suffering." Gertz v. Robert Welch, Inc., 418 U.S. 323, 350, 94 S. Ct. 2997, 3012, 41 L. Ed. 2d 789 (1974). This kind of actual injury was clearly established by the evidence presented at trial.

Id.

In Selby v. Savard, 134 Ariz. 222, 655 P.2d 342 (1982), the Supreme Court of Arizona affirmed a verdict awarding $150,000 actual damages and $350,000 in punitive damages for defamation involving injured reputation, embarassment, humiliation and stress. Plaintiff was an enforcement agent in the Arizona Department of Liquor License and Control and defendant operated a resort that served liquor. Defendant was not satisfied with the way plaintiff handled the investigation and made untrue accusations against plaintiff that were found to be defamatory and uttered with actual malice. Plaintiff offered no medical testi-

mony, but complained of deteriorating health as part of his damages. Plaintiff also showed evidence of declining job performance and, ultimately, retirement as a result of strain caused by defendant's accusations. 655 P.2d at 344.

A plaintiff was awarded $50,000 in compensatory damages and $150,000 in punitive damages when a newspaper article implied she formed an opinion on innocence as a juror prior to the conclusion of evidence. On appeal the award was affirmed. Macon Telegraph Publishing Company v. Elliot, 165 Ga. App. 719, 302 S.E.2d 692, cert. vacated, 251 Ga. 544, 309 S.E.2d 142 (1983), cert. denied, 466 U.S. 971, 104 S. Ct. 2343, 80 L. Ed. 2d 817 (1984).

In Melton v. Bow, 241 Ga. 629, 247 S.E.2d 100, cert. denied 439 U.S. 985, 99 S. Ct. 576, 58 L. Ed. 2d 656 (1978), the Georgia Supreme Court affirmed a verdict of $200,000 in a libel per se defamation case. There, a former university student brought an action for libel against the

university official who accused the student of committing the crime of theft. The Supreme Court found the verdict was not excessive and affirmed the holding of the Georgia Court of Appeals, which found:

> In view of the allegation that Dr. Melton abused his position of authority in a wanton and reckless manner to slander appellee, which allegations were supported by the evidence, and in the absence of any showing of prejudice or bias or corrupt means of reaching the verdict or any abuse of the trial court's discretion in refusing to overturn the verdict, we cannot say the verdict was excessive as a matter of law.

Melton v. Bow, 243 S.E.2d at 593.

Other recent cases involving compensatory verdicts comparable to the instant case include McHale v. Lake Charles American Press, 6 Med. L. Rptr. 2478 (La. Ct. App. 1980), (compensatory damages of $150,000 upheld and $25,000 attorneys' fees added under state statute, where a public figure was libeled by a newspaper editorial and evidence of damage included injury to reputation, humiliation, embarassment and mental distress; loss of income was alleged but not proved); Bindrim

v. Mitchell, 92 Cal. App. 3d 61, 155 Cal. Rptr. 29, cert. denied, 444 U. S. 984, 100 S. Ct. 490, 62 L. Ed. 2d 412 (1979) (trial court judgment affirmed but modified to $75,000 in compensatory and punitive damages where defendant's book pictured a fictional character resembling plaintiff and attributed words to the character found to be defamatory of plaintiff, and where plaintiff's evidence of damages consisted of injury to his profession); Burnett v. National Enquirer, Inc., 144 Cal. App.3d 991, 193 Cal. Rptr. 206 (1983), appeal dismissed, 465 U. S. 1014, 104 S. Ct. 1260, 79 L. Ed. 2d 668 (1984) (award of $50,000 general damages upheld, but $750,000 in punitive damages reduced to $150,000 where newspaper depicted plaintiff entertainer as intoxicated and rude in a Washington, D.C. restaurant, and where damages of lost reputation, shame, mortification and injured feelings were alleged).

Fleming's argument that this is the largest offically reported libel verdict in Virginia history

has no significance in this case, constitutional or otherwise. (Pet. 48) Of no significance at all is the listing of prior libel verdicts in Virginia in Table B of the Petition. The appropriateness of awards should be determined on a case by case basis; it is exceedingly difficult to measure the evidence adduced in one libel trial, perhaps many decades old, with that adduced in another trial on a completely different set of facts. Further, there is some degree of intellectual dishonesty in reproducing verdict amounts that are in some cases more than half a century old, without factoring in inflation. In short, reproducing verdict amounts in defamation cases in Virginia going back to 1925 does not assist this Court in determining whether there is constitutional significance in the award of damages in this case. Of far more significance to this case would be this Court's recent decision in Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 105 S. Ct. 2939, 86 L. Ed. 2d 593 (1985), in which a private plaintiff

recovered $50,000 in compensatory or presumed damages and $300,000 in punitive damages from a non-media defendant upon allegation that its reputation had been injured.

The punitive award—$166,666—is reasonable in light of the evidence of Fleming's malicious publication of the defamation in an attempt to intimidate and silence Moore and other opponents of Evergreen II. The award will serve as a warning to all who would employ similar reprehensible tactics to restrict the exercise of free speech. The award is only two and one half times the size of the compensatory award, a reasonable proportion. It has been held that punitive damages should bear some reasonable relationship to the actual damages suffered, and clearly the relationship here is reasonable. Fleming cites no cases where such a ratio is deemed unreasonable.

A case where the proportion of punitive to compensatory damages was challenged is Marcone v. Penthouse International, Ltd., 577 F. Supp.

318 (E.D. Pa. 1983), rev'd on other grounds, 754 F.2d 1072 (3d Cir.), cert. denied, 106 S. Ct. 182, 88 L. Ed. 2d 151, rehearing denied, 106 S. Ct. 548, 88 L. Ed. 2d 477 (1985)(appeals court found plaintiff to be a limited purpose public figure and held there was insufficient evidence to establish actual malice). There, the jury found that plaintiff had been defamed by an article in the November, 1978 issue of defendant's publication. The article discussed the distribution and sale of marijuana to U.S. markets specifically alleging that the typical new drug businessmen are attorneys since, it was claimed, federal judges do not sentence attorneys to prison. The plaintiff was listed as an example of an "attorney criminal." 577 F. Supp. at 323. The trial jury returned a verdict of $30,000 in compensatory damages and $537,500 in punitive damages for the plaintiff. In reviewing the award the court found that the punitive award was so excessive so as to shock the conscience of the court. Id. at 335. The court noted that

the award was almost 18 times the compensatory figure, which was in the court's view an adequate reflection of the harm inflicted by the defendant." Id. The court then stated:

> The purpose of punitive damages is to punish wrongful conduct and to deter its repetition... The court does not agree with the defendant, however, that the entire punitive damage award must be stricken as the product of passion and prejudice. The defendant does not point to any basis, other than the amount of the award, for finding that the jury was impassioned or prejudiced. Although the court does feel that the award was excessive, the excessiveness appears attributable to the excessive outrage over the total lack of regard for the rights of the plaintiff which the defendant exhibited in this matter.

577 F. Supp. at 335. The court reduced the punitive award to $200,000 based on the finding that the defendant "engaged in outrageous conduct and published the article with knowledge of its falsity or reckless disregard for its truth or falsity based on the other evidence in this case." Id. The court noted that the award as reduced was still over six times the amount of the compensatory damages awarded. Id.

The amount of the punitive award as it now stands represents approximately one-half the cash profit Fleming made from the sale of the Evergreen to the Nature Conservancy. (Tr. 394, 485-87, 499) The record in this case shows that Fleming purchased the land for approximately $35,000 and was paid $335,000 by the Conservancy. Although Fleming testified that the sale price was 50 percent below the fair market value of the property, his own witness, Paul Saunier, revealed enormous tax benefits to Fleming resulting from the sale to the non-profit Conservancy at below market price:

> POINDEXTER: The appraised value was about...
>
> SAUNIER: About a half million, the difference being the, what commits the Nature Conservancy to do these things, to take a business proposition to someone and point out that because of the tax advantages of selling the property for permanent conservation purposes, that the, it, it's a good arrangement for everybody involved.

(Tr. 476). Additionally, the windfall profit realized form the sale of the Evergreen property was not

earned as the result of any improvements Fleming made to the property; the property was sold in virtually the same condition as when Fleming purchased it ten years earlier. Fleming's cash profits and tax savings from the sale of Evergreen exceed $500,000.00.

At trial Fleming testified his net worth was approximately one million dollars in 1982[2]. In fact, the punitive award represents only 16.6 percent of Fleming's net worth, which can hardly be characterized as destructive. Fleming bemoans the chilling effect this award will have upon freedom of speech (Pet. 52). There is no basis for this argument. Fleming lied, he was caught and he was punished. It was Fleming who sought to diminish public debate and free speech by publishing

---

[2]Fleming testified he owned assets worth approximately one million dollars (Tr. 404) and admitted that he undervalued his assets by 50 percent in sworn answers to Moore's discovery, not disclosing correct values for assets and failing to disclose other assets altogether. (Tr. 392-404)

the defamation in an attempt to silence Moore. It was Fleming who abused his position as a licensed real estate salesman and appraiser by maliciously injecting false and defamatory assertions into a debate on the merits of his proposed real estate development.

One object of punitive damages is to punish the immediate wrongdoer who acted wantonly, oppressively, and maliciously; another is to warn him as well as others not to engage in similar conduct. Giant of Virginia, Inc. v. Pigg, 206 Va. 679, 685-686, 152 S.E.2d 271, 277 (1967). The punitive award in this case will carry a message to Fleming's fellow citizens that their right to speak freely against proposed real estate developments and other issues will not be inhibited by developers or others who would limit the right of free speech by attempts to destroy reputations with malicious falsehoods.

There is no fixed standard for measuring punitive damages, and the jury is given reasonable

latitude in exercising its discretion in setting an amount. Old Dominion Branch 4069, National Association of Letter Carriers v. Austin, 213 Va. 377, 386, 192 S.E.2d 737, 743 (1972), rev'd on other grounds, 418 U.S. 264, 94 S. Ct. 2770, 41 L. Ed. 2d 745 (1974). In assessing punitive damages, however, the jury or trial judge can consider a defendant's finances and worth in order to determine an amount to punish him and deter others. Harmon v. Cundiff, 82 Va. 239, 246 (1886).

In affirming the jury's finding of actual malice to support the punitive award in the instant case, the Court made an independent examination of the record to be certain the punitive award did not constitute a forbidden instrusion on free expression. 229 Va. at 49, 325 S.E.2d at 745. It found that the trial court properly instructed the jury that the plaintiff was required to establish by clear and convincing evidence that Fleming knew the statements in his advertisement were

false or that he made them "so recklessly as to amount to a reckless disregard for the truth . . .. Id. at 49, 325 S.E.2d at 745-46. In its opinion, the Court assumed, without deciding, that Fleming was correct in his position that Moore failed to prove that Fleming knew the defamatory statements were false. Id. at 49, 325 S.E.2d at 746. "Nonetheless, there was substantial, credible evidence to support the jury's finding that Fleming acted with recklessness that was tantamount to a willful disregard for the truth." Id. The Court stated:

> Fleming abandoned all judgment and reason in composing and publishing the advertisement. For example, he accused Moore of racial prejudice without possessing any objective basis for the charge. Naming Moore in the publications, Fleming demeaned him as being a tenured position-holder living off the "public dole" at the expense of working people. There is no evidence that Moore or any other person in a similar occupation, was being supported to the prejudice of other groups of citizens. There was no proof that Fleming had any legitimate reason to believe Moore wished to deprive "working people" of any opportunity. Fleming had no grounds to suppose that Moore, as one of the so-called "no-growth people" was oppressing other individuals. Fleming recklessly stated that Moore's opposition to the development on pollution grounds was

> a "sham" to conceal his supposed real purpose, i.e., oppression of black citizens and others who would live in the planned community. Finally, Fleming's act of publishing the advertisement in the student newspaper on the campus where Moore taught supports the conclusion that defendant's motive was to intimidate Moore in order to eliminate the voice of a leading opponent to Fleming's development.

229 Va. at 50, 325 S.E.2d at 746.

Fleming complains that the instructions on damages in this case merely listed the types of injuries that could be redressed without guidance as to how compensation was to be measured, and that these were presumably not "appropriate instructions" as required by Gertz. (Pet. 50-51) The instruction now complained of was given by agreement of counsel; Fleming's counsel, on the record, did not object to this instruction. (Tr. 564) Fleming did not offer an alternative instruction on damages, nor did he offer an instruction which would provide the "guidance" which his counsel now argues should have been provided. Certainly, he cannot now complain of an instruction he agreed to in October, 1982.

Moore notes in passing that the arguments advanced by amici curiae Philadelphia Inquirer and Capital Cities/ABC, Inc. are seriously misplaced. For example, they state the lower court apparently failed to take into account the fact that Moore was "not without the means to remedy any threatened injury by the constitutionally-preferred antidote to one-sided expression". (Brief 24) Presumably, the amici refer to the fact that Moore could have likewise taken out a paid advertisement in the student newspaper and denied that he was a racist or written a letter to the editor denying the charges. Such an argument not only ignores the reality of life, it essentially suggests that causes of action for defamation ought not to exist at all, since presumably reputation can be destroyed with one volley and instantaneously restored, intact in all respects, by serving up a return volley. Such an argument is not worthy of serious consideration by this Court. In addition, it is difficult to gauge what significance, if any,

the selective listing of awards in media libel cases has in this case. (Appendices A and B) This is not a media case, and the awards quoted by the amici dwarf Moore's award in this case.

The compensatory and punitive awards assessed against Fleming were tailored to compensate Moore for the injury he suffered and to punish Fleming for his outrageous conduct. There is no violation of the First Amendment in this case and certiorari is not warranted on these facts.

IV. THERE IS NO STATUTORY OR CONSTITUTIONAL PROVISION WHICH WOULD AFFORD PETITIONER A RULE SUCH AS THAT ENUNCIATED IN BATSON V. KENTUCKY, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

The issues presented in this question were raised in Record No. 84-1740 and certiorari was denied. Fleming v. Moore, Record No. 84-1740, cert. denied, 105 S.Ct. 3513, 87 L.Ed.2d 643 (1985). Moore contends these issues are not now properly

before the Court. Without waiving his objection, however, Moore will respond to Fleming's argument because the decision in Batson v. Kentucky, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) was issued after certiorari was denied in Record No. 84-1740.

At the trial of this case in October, 1982, after both counsel used their peremptory challenges to strike three veniremen each, counsel for Fleming "excepted" to the striking of two black veniremen by counsel for Moore (Tr. 22). The grounds stated in the exception were that "he [Fleming] is entitled to have black people on that jury just like everybody else has ... ." (Tr. 22) There was no suggestion at trial of racial animus on the part of Moore or his counsel in striking these veniremen, nor was there allegation or proof of any pattern of strikes against black jurors by Moore's counsel in other cases. Counsel for Moore did not ask questions or make statements during the voir dire examination and thus there is no reason to

infer racial animus on his part or Moore's. (Tr. 16) No jurors were excused for cause. One juror, a black man, indicated he was a friend of Fleming's former wife and felt that would interfere with his ability to render a fair and impartial verdict and he was excused without objection. (Tr. 13) There followed an extensive voir dire of the venire by counsel for Fleming inquiring into their racial attitudes and relationships, the racial composition of organizations and clubs to which they belonged and the like, at the conclusion of which not a single juror was challenged for cause. (Tr. 16-21) In sum, there were none of the indicia of racial discrimination that apparently existed in Batson. Fleming cannot meet the standards set out in Batson for proving discrimination, even if this were a case governed by Batson, which it plainly is not and ought not be.

The decision in Batson was based solely upon alleged violations of a black criminal defendant's rights under the Sixth and Fourteenth

Amendments and, as Justice Powell stated, "[t]he ultimate issue is whether the State has discriminated in selecting the defendant's venire ..." 106 S.Ct. at ____, 90 L.Ed. 2d at 86. There is no evidence or allegation in the instant case of any government discrimination against Fleming and the Sixth Amendment obviously does not apply. Rather, the constitutional guarantee applicable in this case is found in the Seventh Amendment which only states in relevant part that in civil cases "the right of trial by jury shall be preserved." U.S. Const. amend. VII (1982). In contrast, the Sixth Amendment provides that in all criminal prosecutions the accused is entitled to "an impartial jury" as well as the right to be informed of the nature and cause of accusations against him, to confront witnesses against him, to have compulsory process for obtaining witnesses in his favor and to have assistance of counsel. U.S. Const. amend. VI (1982). Plainly, the safeguards built into the Sixth Amendment, which form the foundation

of the decision in Batson, have no counterpart in the Seventh Amendment. It would require a strained and unprecedented reading of that Amendment to extend the test created in Batson to civil jury trials in the States.

It is difficult to fathom the true basis for Fleming's sweeping request for an extension of the Batson rule (Pet. 57). For example, in Batson, there was no "sensitive racial issue" involved; rather, the only matter relating to race at all was the fact that defendant was black. On the other hand, Fleming asks this Court to extend the Batson rule to civil jury cases in which there are "sensitive racial issues" which he does not define. Presumably, this rule would extend not only to every single case in which the defendant or plaintiff is black, but where there are any "sensitive racial issues" involved, regardless of the race of the parties.

It is submitted that the proposed "sensitive racial issue" standard is unworkable. Even if

this Court were to entertain such a rule, it would be more appropriate to apply it in a narrow class of cases in which a federally-guaranteed right relating to race is involved, such as those cases arising under the Civil Rights Acts. 42 U.S.C. §§ 1981 et seq. (1982). In the instant case, there is no suggestion that any federally-guaranteed right or privilege relating to race is involved. Fleming has already made a vain attempt to assert such rights and privileges in Fleming v. Moore, Record No. 85-1532. The Fourth Circuit Court of Appeals in affirming the dismissal of Fleming's civil rights suit stated:

> There is no question, of course, that in order to sustain an action under 42 U.S.C. §1983, a plaintiff must show both that he has been deprived of a right secured by the Constitution of the United States and that the defendant "deprived [him] of this right 'acting under color of any statute' " of a State. Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 155, 98 S. Ct. 1729, 1733, 56 L. Ed. 2d 185 (1978). There is likewise no question that Moore, in bringing his state libel action against Fleming, did not act on behalf of the State or any of its political subdivisions.

780 F.2d 438, 439-440 (1985), cert. denied, 106 S.Ct. 1644, 90 L.Ed. 2d 189 (1986).

The sole issues for decision by the jury in this libel suit were whether Fleming had falsely accused Moore of harboring racial animus toward him and committing various racist acts, whether these statements were defamatory and whether Moore had been damaged by them. Moore proved conclusively that the accusations against him were false, that he was not a racist and that Fleming had no reasonable basis upon which to conclude that he was a racist. Fleming never attempted to prove that his allegations of racist behavior on Moore's part were true. One searches in vain for the "sensitive" nature of the "racial issues" in this case. The simple fact is that throughout the so-called "Evergreen controversy" Fleming repeatedly used race as a weapon to harass and intimidate those who dared to oppose rezoning of property owned by him and his three white business partners. Fleming's charges of racial

discrimination were simply a means to an end, but certainly not the truth.

Fleming, perhaps realizing the folly of the sweeping and unmanageable rule he suggests, argues that Batson need not extend to every civil case (Pet. 57). It is difficult to understand, however, why this rule would not logically have to be extended to every civil case in which there was a racial issue involved or either party belonged to a "racial group capable of being singled out for differential treatment." Batson, 106 S.Ct. at ____, 90 L. Ed. 2d at 86. Because Batson did not involve a single "sensitive racial issue" and will be applied across the board in every case in which a criminal defendant belongs to such a racial group, there is no reason to think that the rule Fleming asks for can be confined to just one particular class of civil cases involving racial minorities.

In sum, counsel for both parties in this case

used a neutral state statute[3] to exercise peremptory challenges to a panel of veniremen found to be free of any bias or prejudice to either side. The libel action arose exclusively under the common law of Virginia, the parties were a private plaintiff and a non-media defendant, and the defamation related to the non-media defendant's private real estate development. Fleming's rights and privileges under the laws of Virginia and the Constitution of the United States were preserved at every turn, and there is simply no basis on these facts for this Court to extend the Batson rule to a broad class of civil cases as Fleming urges it to do.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be denied. Moore further submits that to the extent any additional response is called

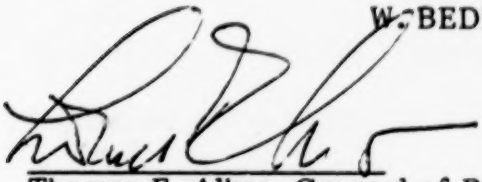
---

[3] VA. CODE ANN. § 8.01-359(B) (1977).

for to Petitioner's Questions 1, 3 and 4, he relies upon the arguments he has already filed with this Court in response to Fleming's petitions in Record Nos. 84-382, 84-1740 and 85-1532.

Respectfully submitted,

W. BEDFORD MOORE, III



Thomas E. Albro, Counsel of Record
Smith, Taggart, Gibson & Albro
105-109 E. High Street
P.O. Box 1585
Charlottesville, VA 22901
Telephone: (804) 977-4455

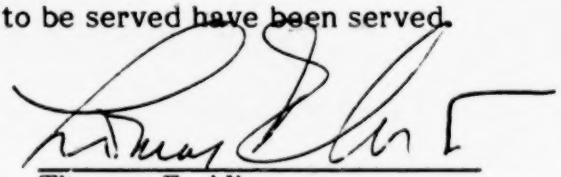
Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of September, 1986, I served counsel of record for petitioner with three (3) copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari by mailing the same, first class postage prepaid, to counsel at the following address:

Eric Schnapper
NAACP Legal Defense and
Educational Fund, Inc.
16th Floor, 99 Hudson Street
New York, NY 10013

All parties to be served have been served.



Thomas E. Albro

Appendix A

IN THE SUPREME COURT OF VIRGINIA
AT RICHMOND

JAMES N. FLEMING,

Appellant

v.

W. BEDFORD MOORE, III,

Appellee

Record No. 85-0622

PETITION FOR APPEAL

August 13, 1985

Pages 1, 2, 3 and 4

To The Honorable Chief Justice and
The Justices of the Supreme Court of Virginia:

I. NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

This appeal arises out of a libel claim by W. Bedford Moore, III ("Moore") concerning a 1976 newspaper advertisement placed by James N. Fleming ("Fleming"). That claim has generated two trials, two previous appeals to this Court, and a remittitur hearing. Fleming seeks this appeal to correct the trial court's failure at the remittitur hearing to follow this Court's mandate to reduce the jury award substantially.

This Court is well familiar with the appellate history of this case. The first trial of this matter resulted in a jury verdict in favor of Moore for $10,000 compensatory damages and $100,000 punitive damages. On March 6, 1981, the judgment of the Circuit Court of Albemarle County was reversed and remanded for a new trial consistent with this Court's opinion. Fleming v. Moore, 221 Va. 884, 275 S.E.2d 632 (1981) ("Fleming I").

The second trial took place on October 21-22, 1983. The jury returned a verdict in favor of Moore for $100,000 compensatory damages, $250,000 punitive damages, and interest on the $250,000 award at the rate of 12% per year beginning on the date of the advertisement's publication, January 16, 1976 (Tr. 608).[1]

On February 1, 1985, this Court affirmed the findings of compensatory and punitive liability against Fleming. This Court further held, however, that both the compensatory and punitive awards were excessive, and ordered the trial court to reduce those awards substantially. Fleming v. Moore, decided sub nom. Gazette, Inc. v. Harris, 229 V.R.R. 783, 846-47, 850-52, 325 S.E.2d 713,

---

[1] Appellant will refer to the second Fleming jury trial transcript as "(Tr. ___)," to the transcript of the remittitur hearing as "(Remit. Tr. ___)," to Moore's exhibits as "(PX __)," and to his own exhibits as ("DX ___)."

cert. denied, 53 U.S.L.W. 3895 (U.S. June 24, 1985) (No. 84-1740) ("Fleming II").

The Circuit Court of Albemarle County held a remittitur hearing on April 16, 1985. The trial court ordered:

> Moore shall submit to a new trial on the issue of damages only or shall remit one-third of the compensatory damage award of $100,000 and one-third of the punitive damage award of $250,000, resulting in a compensatory damage award of $66,666.67 and a punitive damage award of $166,666.67. Plaintiff's request for the award of prejudgment interest on the resulting compensatory damage award is denied.

Final Judgment Order at 2. Moore accepted the trial court's remittitur without protest or exception. Id. at 2.

The trial court entered its Final Judgment Order on May 13, 1985. Fleming noted his appeal on the same day.

II. ASSIGNMENTS OF ERROR

A. The trial court failed to remit the compensatory and punitive awards to amounts that are not excessive as a matter of law.

B. The trial court failed to comply with the Fleming II mandate.

III. QUESTIONS PRESENTED

A. Whether the remitted compensatory and punitive awards remain excessive as a matter of law (Assignment of Error A).

B. Whether the trial court violated the Fleming II mandate by not remitting the compensatory and punitive awards substantially (Assignment of Error B). . .

Supreme Court, U.S.
FILED
OCT 2 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2168

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JAMES N. FLEMING,

Petitioner,

v.

W. BEDFORD MOORE, III,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

REPLY BRIEF FOR PETITIONER

D. ALAN RUDLIN
W. JEFFREY EDWARDS
Hunton & Williams
P.O. Box 1535
Richmond, Virginia 23212
(804) 788-8200

J. BENJAMIN DICK
Suite 2
421 Park Street
Charlottesville, Virginia 22901

GERALD E. POINDEXTER
Surry Courthouse Square
Surry, Virginia

J. LEVONNE CHAMBERS
ERIC SCHNAPPER*
NAACP Legal Defense &
Educational Fund, Inc.
16th Floor
99 Hudson Street
New York, New York 10013
(212) 219-1900

SAMUEL W. TUCKER
Hill, Tucker & Marsh
P.O. Box 27363
Richmond, Virginia 23261

*Counsel of Record

Attorneys for Petitioner

TABLE OF CONTENTS

	Page
Table of Authorities	ii
I. This Court Has Jurisdiction Over All of the Questions Set Forth in the Petition ..	1
II. The Verdict In This Case is Unconstitutionally Excessive	7
Conclusion	19

TABLE OF AUTHORITIES

Cases:	Page
Barclay v. Florida, 463 U.S. 939 (1983)	2
Beauharnais v. Illinois, 343 U.S. 250 (1952).....	11,12,13
Beebe v. Russell, 60 U.S. 283 (1957)	6
Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 86 L.Ed.2d 593 (1985)	9,14
California National Bank v. Stateler, 171 U.S. 447 (1898) ...	5
Carey v. Piphus, 435 U.S. 247 (1978)	19
Cox Broadcasting Corp. v. Cohn, 420 U.S 469 (1975)	6
Craighead v. Wilson, 59 U.S. 199 (1856)	6
Electrical Workers v. Foust, 442 U.S. 42 (1979)	14,15
Ford Motor Co. v. EEOC, 458 U.S. 219 (1982)	10
Gertz v. Welch, 418 U.S. 323 (1974)	8,10,15,18

Cases: Page

Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 252 (1916) 3

Hanover Shoe Co. v. United Shoe Machine Corp., 392 U.S. 481 (1968) 2

Hollander v. Fechheimer, 162 U.S. 326 (1896) 6

Indianapolis v. Chase National Bank, 314 U.S. 63 (1941) 2

Keystone Manganese & Iron Co. v. Martin, 132 U.S. 91 (1889) 6

Liberty Mutual Insurance Co. v. Wetzel, 424 U.S. 737 (1976) 5

Lodge v. Twell, 135 U.S. 232 (1896) 6

Maryland v. Baltimore, 338 U.S. 912 (1950) 4

McGourkey v. Toledo & Ohio C. Railway Co., 146 U.S. 5436 (1892) 6

Mercer v. Theriot, 377 U.S. 152 (1964) 1,2

NAACP v. Williams, 359 U.S. 550 (1959) 5

Cases: Page

Newport v. Fact Concerts, 453 U.S. 247 (1981) 14

New York Times v. Sullivan, 376 U.S. 1 (1964) 11

Reece v. Georgia, 350 U.S. 85 (1956) 1,3

Smith v. Wade, 461 U.S. 30 (1983) 11,15

Spaziano v. Florida, 82 L.Ed.2d 340 (1984) 12

Time, Inc. v. Firestone, 424 U.S. 448 (1976) 18

Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399 (1923) 5

United Mutual Life Ins., Co. v. Kirchoff, 60 U.S. 374 (1896) 6

Urie v. Thompson, 337 U.S. 163 (1949) 1

Statutes:

Code Va., § 18.2-11(c) 13

Code Va., § 18.2-417 13

Cases: Page

Other Authorities:

Blackstone's Commentaries (St. George Tucker Ed., 1803) ... 17

T. Cooley, A Treatise on Constitutional Limitations (1868) 18

F. Holt, The Law of Libel (1812) .. 17

REPLY BRIEF FOR PETITIONER

I. THIS COURT HAS JURISDICTION OVER ALL OF THE QUESTIONS SET FORTH IN THE PETITION

When this Court reviews an order finally adjudicating the rights of parties to a civil action, the Court's jurisdiction encompasses review of all earlier decisions on which that final order rests:

> We now "consider all of the substantial federal questions determined in the earlier litigation"... for it is settled that we may consider questions raised on the first appeal, as well as "those that were before the Court of Appeals on the second appeal"

Mercer v. Theriot, 377 U.S. 152, 153-54 (1964).[1] This Court, in reviewing such a

[1] See also Reece v. Georgia, 350 U.S. 85, 87 (1956) ("We have jurisdiction to consider all of the substantial federal questions determined in the earlier stages of litigation"); Urie v. Thompson, 337

final order, has not hesitated to address legal issues which were the subject of an earlier unsuccessful petition for certiorari[2], or of a writ that had been previously dismissed as improvidently granted[3], or regarding which the petitioner could earlier have sought, but

---

U.S. 163, 171-73 (1949) (Court has jurisdiction to consider "all substantial federal questions actually determined in earlier stages of the litigation by the court whose final adjudication is brought here for review").

[2] Barclay v. Florida, 463 U.S. 939, 945-56 (1983) (earlier denial of certiorari reported at 439 U.S. 892 (1978)); Hanover Shoe Co. v. United Shoe Machine Corp., 392 U.S. 481, 488 n.6 (1968) (earlier denial of certiorari: reported at 364 U.S. 901 (1960)); Mercer v. Theriot, 377 U.S. 152, 153 (1964) (earlier denial of certiorari reported at 359 U.S. 983 (1959)); Indianapolis v. Chase National Bank, 314 U.S. 63, 71 (1941) (earlier denial of certiorari reported at 305 U.S. 600 (1938)).

[3] Hughes Tool Co. v. Trans World Airlines, 409 U.S. 363, 365 n.1 (1973) (dismissal of earlier writ reported at 380 U.S. 248 (1965)).

failed to seek, review by this Court.[4]

In Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251 (1916), this Court unanimously rejected the very jurisdictional argument now advanced by respondent in this case. In Hamilton-Brown, as here, the first appeal, although resolving the issue of liability, remanded the case for further proceedings regarding the scope of the remedy, and this Court initially denied certiorari. 214 U.S. 514 (1909). When certiorari was granted following the entry of the subsequent decree, the respondent contended that the Court had no jurisdiction over the liability issues. In rejecting that contention the court emphasized:

> [E]xcept in extraordinary cases, the writ [of certiorari] is not issued

---

[4] Reece v. Georgia, 350 U.S. 85, 87 (1956).

> until final decree. ...[T]he refusal of an application for this extraordinary writ is in no case equivalent to an affirmance of the decree sought to be reviewed. ...[T]his Court, in now reviewing the final decree by virtue of the writ of certiorari, is called upon to notice and rectify any error that may have occurred in the interlocutory proceedings.

240 U.S. at 257-58

Respondent appears to believe that the earlier denials of certiorari in this case constituted decisions on the merits, arguing that in the wake of those denials that petitioner "has had his day in [this] court." (Br. Opp. 5). Justice Frankfurter admonished over a generation ago that a denial of certiorari

> carries with it no implication whatever regarding the merits of a case which [the Court] has declined to review. The Court has said this again and again; again and again this admonition has to be repeated.

Maryland v. Baltimore, 338 U.S. 912, 919 (1950) (Frankfurter, J.). Thus

> a mere denial of the writ to an interlocutory ruling of the circuit court of appeal does not limit our power to review the whole case when it is brought here by our certiorari on final decree.

Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 418 (1923).

Respondent urges that, when the lower courts determine the issues of liability in a civil action but defer adjudication of the appropriate remedy, the liability determination is a final order which not only can but must be reviewed at once by this Court if it is to be reviewed at all (Br. Opp. 4). In Liberty Mutual Insurance Co. v. Wetzel, 424 U.S. 737 (1976), this Court unanimously rejected that very contention, as it had in at least nine earlier cases.[5]

---

[5] NAACP v. Williams, 359 U.S. 550, 551 (1959) (Douglas, J.) (order imposing $25,000 fine subject to modification as to amount not final); California National

If, as respondent contends, every liability determination is a final order even though the remedy to be awarded remains unresolved, many civil actions would automatically require two separate appeals, and review of interlocutory orders by this Court would become the rule rather than the exception. In the instant case, had the trial court following the 1985 remand awarded only nominal damages of $1, the litigation would for all practical purposes have been rendered

---

Bank v. Stateler, 171 U.S. 447, (1898) (order contemplating further proceedings to calculate costs, disbursements and fees not final); Craighead v. Wilson, 59 U.S. 199 (1856) (order in estate case determining heirs, but deferring calculation of inheritances, not final); Beebe v. Russell, 60 U.S. 283 (1857); Keystone Manganese & Iron Co. v. Martin, 132 U.S. 91 (1889); Lodge v. Twell, 135 U.S. 232 (1890); McGourkey v. Toledo & Ohio C. Railway Co., 146 U.S. 536 (1892); United Mutual Life Insurance Co. v. Kirchoff, 160 U.S. 374 (1896); Hollander v. Fechheimer, 162 U.S. 326 (1896).

moot. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) cannot be understood to require that certiorari be granted before such a possibility of mootness has been eliminated.

II. THE VERDICT IN THIS CASE WAS UNCONSTITUTIONALLY EXCESSIVE

Respondent asserts that there have been other cases in which juries awarded damages in excess of $100,000 to plaintiffs who suffered no economic injury whatever and that punitive damages of more than $250,000 are equally common. (Br. Opp. 33-40). The size of the verdicts recounted by the respondent, we believe, is indicative of the importance and recurring nature of the issues raised by question 2 in our petition.

The constitutionality of the verdict in this case should be measured, not by the extent to which exorbitant libel

verdicts may currently be in fashion, but by the historical principles that underlie the First Amendment. If certiorari is granted, we will urge that the enormous verdict in this case is inconsistent with the First Amendment for at least three distinct reasons.

First, we contend, a libel plaintiff is under at least as great an obligation as any other plaintiff to mitigate his damages. This Court held as much in Gertz v. Welch, 418 U.S. 323 (1974), emphasizing that "[t]he first remedy of any victim of defamation is self-help -- using available opportunities to contradict the lie or correct the error and thereby minimize its adverse impact on reputation." 418 U.S. at 344. Under the First Amendment the preferred form of redress for objectionable speech is more speech; a libel

action is available, if at all, only to the extent that such corrective self-help has proved ineffective. The common law obligation to mitigate damages is a rule of constitutional dimension in a libel case.

The alleged libel in the instant case was contained in a $88.00 advertisement in a college newspaper. Respondent could, at nominal expense, have printed a reply that would have been circulated to precisely the same audience that might have seen the original advertisement. But unlike the plaintiff in Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 86 L.Ed.2d 593 (1985), who took all possible action to correct the allegedly inaccurate statement, 86 L.Ed.2d at 597-98, the plaintiff in this action took absolutely no steps to contradict or dispute the

alleged libel, and now insists he was not obligated even to "writ[e] a letter to the editor denying the charges." (Br. Opp. 49). In the absence of the self-help measures required by Gertz, the First Amendment precludes any award of more than nominal damages. Cf. Ford Motor Co. v. E.E.O.C., 458 U.S. 219 (1982).

Second, we contend that the First Amendment precludes any award of punitive damages in a libel case, at least where matters of public concern are involved. Because the avowed purpose of punitive damages is to punish the defendant, and because the amount of such damages is measured in part by the gravity of the perceived "offense", punitive damages are essentially "private fines". Gertz v.

Welch, 418 U.S. 323, 350 (1974).[6] Such punitive measures are constitutionally indistinguishable from a criminal fine, and may only be imposed under the circumstances in which a criminal sanction would be constitutionally permissible. "What a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel." New York Times v. Sullivan, 376 U.S. 1, 277 (1964). The types of libel which may constitutionally be declared criminal are far narrower than ordinary libel; criminal libel is limited to utterances with a "tendency to cause breach of the peace." Beauharnais v. Illinois, 343 U.S. 250, 254 (1952). If,

---

[6] Smith v. Wade, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting) (an action for punitive damages is a "quasi-criminal" proceeding).

as Beauharnais indicates, a state could not impose a criminal fine for other types of libels, ipso facto it cannot authorize civil juries to impose private fines in such cases.

Because the imposition of a punishment for allegedly libelous speech implicates both First and Eighth Amendment interests, the appropriate level of any such sanctions must be established by an elected legislature, rather than by an ad hoc collection of jurors who may be prompted by personal or partisan passions. Cf. Spaziano v. Florida, 82 L.Ed.2d 340 (1984). In Virginia the state legislature, presumptively expressing the views of the community as to the appropriate degree of punishment for various types of offenses, has concluded that in the case of criminal libel tending to provoke

violent conduct the maximum permissible punishment should be a fine of no more than $500. See Code Va. §§ 18.2-11(c), 18.2-417. In the instant case, the private fine of $166,666.00 is 333 times higher than the maximum fine that could have been imposed had petitioner been guilty of the far more serious conduct which Virginia categorizes as criminal libel. The sentence upheld by this Court in Beauharnais itself was only a $200 fine. The size of the private fine imposed in this case raises substantial questions under the Eighth as well as the First Amendment.

The past decisions of this Court have not sanctioned the use of punitive damages to impose for non-criminal libels a punishment far in excess of the punishment authorized for criminal libel

itself. In 1974 Gertz noted the dangers inherent in any use of punitive damages in a libel action. Since Gertz the only instance in which this Court has upheld an award of punitive damages in a libel action is Dun & Bradstreet v. Greenmoss Builders, 86 L.Ed.2d 593 (1985), a case in which the defendant did not question the propriety of punitive damages as such, and which turned on the fact that the speech involved was not a matter of public concern.

In Newport v. Fact Concerts, 453 U.S. 247 (1981), this Court refused to permit awards of punitive damages in § 1983 actions against municipalities because of the danger of crushingly exorbitant awards. 453 U.S. at 270-71. In Electrical Workers v. Foust, 442 U.S. 42 (1979) the Court forbade the imposition

of punitive damages under the Railway Labor Act, reasoning that the spectre of such awards might well deter entirely proper conduct. 442 U.S. at 50-52.[7] Members of this Court have repeatedly emphasized the danger that punitive awards will merely express a jury's hostility towards a particular defendant or towards the unpopular views a defendant may have espoused. Gertz, 418 U.S. at 351 (jury discretion used "to punish expressions of unpopular views"); Electrical Workers v. Foust, 442 U.S. at 50 n.14 (verdicts may reflect "[c]ommunity hostility towards unions, management, or minority views"); Smith v. Wade, 461 U.S. at 59 (Rehnquist, J., dissenting) ("punitive damages are

---

[7] See also Smith v. Wade, 461 U.S. at 94 (O'Connor, J., dissenting) (punitive damages in section 1983 cases against officials may "chill public officials in the performance of their duties").

frequently based upon the ... prejudice of jurors"). *This danger of abuse, together* with the chilling effect of potentially enormous judgments, compel the conclusion that the award of punitive damages in libel actions is inconsistent with the First Amendment.

Third, we believe that the First Amendment precludes a state from awarding compensatory damages in a libel action such as this where the plaintiff asserts as his sole injury that he was "embarrassed and humiliated" (Pet. App. 94). Although the existence of a civil action for libel may be consistent with the First Amendment, the scope of such an action cannot in general be broader than the scope of libel actions that were permitted under the common law at the time the First Amendment was adopted. In the late

eighteenth century judges and juries were clearly forbidden to award damages for the sort of hurt feelings and tainted honor of which respondent complained in the instant case. At common law permissible libel actions were generally limited to three specific instances -- libels causing economic injury to plaintiff's trade or business, libels placing a plaintiff in danger of criminal prosecution, and libels which resulted to a substantial and demonstrable degree in social ostracization of the plaintiff. Blackstone's Commentaries, v. iii, pp 123-25 (St. George Tucker Ed., 1803); F.Holt, The Law of Libel, 161 (1812). All of the examples of compensable injury recited by Blackstone were economic in nature. Commentaries, v.iii, pp 123-25.

The types of libels and injuries for

which the states award damages today are far broader than those permitted in the eighteenth century. The creation by the state courts of libel actions for humiliation, anguish, and emotional suffering marks a radical redefinition of the boundary between actionable libel and constitutionally protected free speech. This drastic expansion of libel law clearly raises serious constitutional questions. Cf. T. Cooley, Treatise on Constitutional Limitations, 430 (1868).[8]

---

[8] Although libel actions today, as in the eighteenth century, may not be limited to solely economic injuries, the scope of non-economic injuries for which recovery could be had in 1791, and which would be consistent with the First Amendment, is, we urge, decidedly narrower than the broad language of Gertz, 418 U.S. at 349-50, and Time, Inc. v. Firestone, 424 U.S. 448, 460-61 (1976). In Firestone the plaintiff won $100,000 in damages because of a false allegation that she had committed adultery, 424 U.S. at 458-59; Blackstone regarded an allegation of adultery as a paradigm of the sort of statement that was

Under these circumstances, even if the finding of liability was correct, the First Amendment forbade the state courts from awarding more than nominal damages. Carey v. Piphus, 435 U.S. 247 (1978).

CONCLUSION

For the above reasons a writ of certiorari should be issued to review the

---

not actionable at common law. Commentaries,. v. iii, p. 124.

judgments and opinions of the Virginia Supreme Court.

Respectfully submitted,

J. LeVONNE CHAMBERS
ERIC SCHNAPPER*
NAACP Legal Defense & Educational Fund, Inc.
16th Floor
99 Hudson Street
New York, NY 10013

Attorneys for Petitioner

*Counsel of Record

MOTION FILED
AUG 7 1986

No. 85-2168

IN THE

Supreme Court of the United States

October Term, 1985

JAMES N. FLEMING,

Petitioner,

v.

W. BEDFORD MOORE, III,

Respondent.

MOTION OF THE PHILADELPHIA INQUIRER AND CAPITAL CITIES/ABC, INC. FOR LEAVE TO FILE BRIEF, AS *AMICI CURIAE*, WITH BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF *CERTIORARI* TO THE SUPREME COURT OF VIRGINIA

HENRY R. KAUFMAN
404 Park Avenue South
New York, New York 10016
(212) 889-2308
Attorney for Amici Curiae

Of Counsel
SAMUEL E. KLEIN
KOHN, SAVETT, KLEIN
& GRAF, P.C.
2400 One Reading Center
1101 Market Street
Philadelphia, Pennsylvania
(215) 238-1700

SAM ANTAR
Capital Cities/ABC, Inc.
1330 Avenue of the Americas
New York, New York 10019
(212) 887-4013

No. 85-2168

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1985

JAMES N. FLEMING,

Petitioner,

v.

W. BEDFORD MOORE, III,

Respondent.

MOTION OF THE PHILADELPHIA INQUIRER AND CAPITAL CITIES/ABC, INC. FOR LEAVE TO FILE BRIEF, AS *AMICI CURIAE*, IN SUPPORT OF PETITION FOR A WRIT OF *CERTIORARI* TO THE SUPREME COURT OF VIRGINIA

The proposed *amici curiae* respectfully move this Court for permission to file the attached brief in support of the petition for a writ of *certiorari* in this action.

Petitioner's written consent, by Eric Schnapper of the NAACP Legal Defense and Education Fund, Inc. is being filed herewith. However, this motion is necessitated because Respondent's consent to file, although requested, has not been received.

The amici are leading media organizations. They have an interest in supporting the petition because they have themselves either been the subjects of excessive libel damage awards or they could be subject to such awards in the future. All too frequently, in recent years, questionable libel judgments have also imposed grossly excessive damage awards. See Appendix A and Appendix B to the accompanying brief. Amici believe that the final enforcement of such judgments and awards would

"constitute a forbidden intrusion on the field of free expression."

While the petition they support involves a "non-media" libel defendant, amici are nonetheless concerned about a case which they believe presents the spectre of a constitutionally-suspect libel judgment, imposing an excessive damage award, left unremedied -- indeed left largely unreviewed -- by the court below.

In the past, lower state and federal appellate courts have often, but not always, performed well their constitutional mandate to prevent the imposition of constitutionally-impermissible libel judgments. However, when courts of inferior jurisdiction fail in that mission -- as amici believe happened here -- this Court must stand ready to exercise its

power of certiorari review so that errors of constitutional dimension are not left uncorrected.

The amici believe their brief can be of assistance to the Court in identifying the errors amici have concluded inhere in the judgment below. Amici also wish to alert this Court to the urgent need for certiorari oversight in order to assure that speech on issues of undoubted public concern is not unconstitutionally abridged by the enforcement of clearly erroneous libel judgments imposing excessive and "chilling" libel damage awards.

Accordingly, the proposed amici curiae respectfully request that this Court grant them permission to file the attached brief in support of the petition for a writ of certiorari to the Supreme Court of Virginia.

Respectfully submitted,

HENRY R. KAUFMAN, ESQ.
Attorney for Amici Curiae
404 Park Avenue South
New York, New York 10016
(212) 889-2308

Of Counsel:

Samuel E. Klein
Kohn, Savett, Klein & Graf, P.C.
2400 One Reading Center
1101 Market Street
Philadelphia, Pennsylvania 19107
(215) 238-1700

Sam Antar
Capital Cities/ABC, Inc.
1330 Avenue of the Americas
New York, New York 10019
(212) 887-4013

August 6, 1986

No. 85-2168

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1985

JAMES N. FLEMING,

Petitioner,

v.

W. BEDFORD MOORE, III,

Respondent.

BRIEF OF THE PHILADELPHIA INQUIRER AND CAPITAL CITIES/ABC, INC., AS AMICI CURIAE, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

TABLE OF CONTENTS

Legal and Factual Background 1

POINT I - 9
Petitioner's Charge of Racism Was the Kind of Rhetorical Hyperbole that Is Not Actionable Under the Common Law or the First Amendment

POINT II - 16
The Finding of Actual Malice Was Based on a Constitutionally-Improper Standard and Analysis

POINT III - 23
The Damage Award Violates the First Amendment

A. An Award Approaching $250,000 is Grossly Excessive Under the Circumstances 23

B. The Compensatory Award Violates Constitutional Limitations on Actual Damages in Libel Actions . . . 25

C. The Punitive Damage Award Also Violates the First Amendment 28

D. Libel Awards Violative of the First Amendment Should Be Reversed and Not Merely Remitted 34

POINT IV - 37
The "Independent" Review Required in Constitutional Libel Actions Mandates Grant of the Petition on All Three Issues

A. An Erroneous Actual Malice Finding Should Be Reviewed . . 37

B. The Failure to Consider a Question of Constitutional Dimension, Such as First Amendment Protection for Hyperbole, Mandates Review by this Court 40

1. Protection of Hyperbole is a First Amendment Interest Requiring Independent Review 40

2. In Granting the Petition the Court Need Not Delineate the Full Contours of Constitutional Protection for Statements of Opinion. .42

C. Certiorari Should Be Granted to Prevent the Imposition of Excessive and Unconstitutional Libel Damage Awards 43

Conclusion 45

Appendix A - A-1
Recent Trends in Libel Damage Awards Against the Media

Appendix B - B-1
Recent Million-Dollar Awards in Media Libel, Privacy and Related Cases and their Disposition

TABLE OF AUTHORITIES

Cases

Abrams v. United States, 250 U.S. 616 (1919)..... 34

Aetna Life Insurance Co. v. Lavoie, 106 S.Ct. 1580 (1986).....29

Beckley Newspapers Corp. v. Hanks, 389 U.S. 81 (1967).....21

Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485 (1984).....5
17, 18, 40

Cafeteria Employees Union, Local 302 v. Angelos, 320 U.S. 293 (1943).....15

Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).....17, 29, 30

Dun & Bradstreet v. Greenmoss Builders, 86 L. Ed. 2d 593 (1985)..9, 31

Garrison v. Louisiana, 379 U.S. 64 (1964).....17, 18

Gertz v. Robert Welch, Inc.,
418 U.S. 323 (1974).....2, 3, 4, 22,
25, 26, 31, 32,
38

Greenbelt Cooperative
Publishing Association, Inc.
v. Bresler, 398 U.S. 6 (1970).....2, 14,
15, 21, 41

Hotchner v. Castillo-Puche,
551 F.2d 910 (2d Cir. 1976),
cert. denied sub. nom.
Hotchner v. Doubleday & Co.,
434 U.S. 834 (1977).....22

New York Times Co. v.
Sullivan, 376 U.S. 254 (1964)...1, 2, 5,
29, 32

Old Dominion Branch No. 496,
National Association of
Letter Carriers v. Austin,
418 U.S. 264 (1974).....2, 15

Ollman v. Evans, 105 S.Ct. 2662
(1985).....42

Philadelphia Newspapers,
Inc. v. Hepps, 106 S.Ct. 1558
(1986).....10

Rosenbloom v. Metromedia,
Inc., 403 U.S. 29 (1971).....30, 31, 38

St. Amant v. Thompson, 390
U.S. 727 (1968).....4, 17, 18

Time, Inc. v. Hill, 385 U.S.
374 (1967).....3

Other Authorities

Franklin, Foreword: Five Years of Cases at the Supreme Court Door - A Look at the Quiet Side, LDRC 50-State Survey 1985-86: Current Developments in Media Libel and Invasion of Privacy Law (Libel Defense Resource Center 1986).....44

Restatement (Second) of Torts §566 (1977).....13, 14

Van Alstyne, First Amendment Limitations on Recovery from the Press, 25 Wm. & Mary L. Rev. 793 (1984).....36

Factual and Legal Background

In pursuing the difficult and sensitive task of balancing the competing interests of freedom of expression and protection of reputation this Court has, over the past two decades, wisely recognized several fundamental First Amendment principles pertinent to its consideration of this petition. It has held that "uninhibited, robust, and wide-open ... debate on public issues" represents a "profound national commitment" which must be protected and that such debate "may well include vehement, caustic, and sometimes unpleasantly sharp attacks ...," New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964); that "under the First Amendment there is no such thing as a false idea" and

that "however pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas," Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974); that "debates about controversial issues" are often "heated" and that, under the First Amendment, obvious "rhetorical hyperbole," "vigorous epithet" and "lusty ... expression of contempt" are to be expected, must be protected and need not be "tone[d] down," Greenbelt Cooperative Publishing Association, Inc. v. Bresler, 398 U.S. 6, 13-14 (1970); Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin, 418 U.S. 264, 285-86 (1974); that "the fear of [libel] damage awards ... may ... markedly ... inhibit ..." free expression, New York Times v.

Sullivan, supra, 376 U.S. at 277, and that "fear of large verdicts in damage suits ... must inevitably cause publishers to 'steer ... wider of the unlawful zone' ... and thus 'create the danger that the legitimate utterance will be penalized,'" Time, Inc. v. Hill, 385 U.S. 374, 389 (1967); that "the largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms" and that, therefore, the Constitution precludes "gratuitous awards of money damages ... in excess of actual injury," Gertz v. Robert Welch, Inc., supra, 418 U.S. at 349; that because "juries assess punitive damages in wholly unpredictable amounts

... [a]nd [jurors] remain free to use their discretion selectively to punish expressions of unpopular views ... unnecessarily exacerbat[ing] the danger of ... self-censorship," therefore "the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth," id. at 349, in the sense that defendant "in fact entertained serious doubts as to the truth of his publication," St. Amant v. Thompson, 390 U.S. 727, 731 (1968)(emphasis added); finally, in order to assure that all of these fundamental First Amendment concerns are not violated in adjudicating a libel claim, that this Court -- and the lower state and federal courts -- "must 'make an independent examination of the

whole record' ... so as to assure ... that the judgment does not constitute a forbidden intrusion on the field of free expression," New York Times Co. v. Sullivan, supra, 376 U.S. at 285 (emphasis added); see also Bose Corp. v. Consumers Union of the United States, 466 U.S. 485 (1984).

Amici are constrained to conclude, on the very face of the Petition and Appendix, that each of these fundamental principles has either been violated, or would be placed in jeopardy, by the judgment below. Petitioner's publication, labelling as "racism" white opposition to a black real estate development project, would seem no more than the kind of "vehement, caustic and sometimes unpleasantly sharp attack" that is to be expected as a part of the

"uninhibited, robust and wide-open debate on public issues"; petitioner's strong -- albeit perhaps intemperate -- personal views about his opponents would seem no more than the expression of an "opinion ... however pernicious" that should be answered or corrected through "the competition of other ideas" and not by means of the imposition of coercive libel judgments; petitioner's vituperative language, of the kind often bandied about in disputes between different racial groups, would seem no more than an expected part of the "heated ... debate ... about controversial issues" that often entails the use of obvious "rhetorical hyperbole," "vigorous epithet" and "lusty ... expression of contempt;" an almost quarter-million dollar damage award against an

individual would "inevitably cause" future speakers to "steer ... wider" of this newly created "unlawful zone" -- i.e., the passionate charge of "racism" based upon public positions perceived as unfavorable to blacks or other minority groups -- and will "create the danger that the legitimate utterance will be penalized" or chilled; a compensatory damage award approaching $75,000, based upon findings summarized in Point III B., infra, represents the kind of "gratuitous" award "in excess of actual injury" that "unnecessarily compounds the potential of [libel] to inhibit the vigorous exercise of First Amendment freedoms"; a punitive damage award approaching $200,000, based upon the findings summarized in Point III C., infra, would also violate petitioner's constitutional rights;

finally, the lower court's failure at all to consider the issue of rhetorical hyperbole and its failure adequately and correctly to review the issues of actual malice and damages, would also violate petitioner's right to an "independent" review of issues of constitutional dimension. (See Points I and II, infra.)

It is for these reasons that amici submit this brief in support of the petition. They do so in order to assist this Court in identifying the errors amici believe inhere in the judgment below. Amici also wish to alert this Court to the urgent need for certiorari oversight -- in both "media" and "non-media" libel actions -- to assure that speech of undoubted public concern is not unconstitutionally abridged by the enforcement of clearly

erroneous libel judgments and by the imposition of excessive and "chilling" libel damage awards.

POINT I - Petitioner's Charge of Racism Was the Kind of Rhetorical Hyperbole that Is Not Actionable Under Either the Common Law or the First Amendment

By and large established media publications do not indulge in the kind of highly personal rhetoric at issue in this case, although they are not infrequently called upon to report such charges made by others.* Moreover,

---

* In this section, and those below, it is assumed that a majority of this Court may be of the view that there is no difference in constitutional libel law between media and non-media defendants, at least as to matters of obvious public concern such as those involved in this case. Compare Dun & Bradstreet v. Greenmoss Builders, 86 L.Ed.2d 593, 618-19 (1985) (Brennan, J., dissenting)

(footnote continued)

even the most responsible journalism presents editorials and commentary that may include strong and at times one-sided argumentation. Amici are concerned that the judgment of the courts below, in penalizing vehement and opinionated rhetoric,* fails to give due regard, and sufficient protection, to such ideas and expression.

This Court has wisely recognized

(footnote continued)

with Philadelphia Newspapers, Inc. v. Hepps, 106 S.Ct. 1558, 1565 n.4 (1986) (O'Connor opinion) and with 106 S.Ct. at 1565-66 (1986) (Brennan, J. with whom Blackmun, J. joined, concurring.)

* For purposes of this brief, the broad term hyperbole is used to encompass epithets, disparaging and abusive words or charges and all other exaggerated rhetoric that, based on the context of their use, obviously express their author's opinions, beliefs, or predilections and cannot reasonably be understood as statements or assertions of fact.

that the First Amendment demands the greatest care in evaluating the context and significance of expression sought to be made the basis for prescription or sanction as libelous utterance. Unfortunately, the court below failed to apply such "sensitive tools" to this constitutionally-mandated task of examining the contextual implications of petitioner's charge of "racism." The court below also failed to appreciate the startling implications for freedom of expression of its holding that an angry charge of "racism" is actionable in defamation.*

---

* Only one judge in the court below, on a prior appeal, appeared to understand the need for a sensitive and at the same time common-sense approach to the meaning and implications of petitioner's publication. As Judge Harrison wisely noted: "The words 'racism' and 'racist' are bandied about in our society with complete abandon. People of all races

(footnote continued)

It is difficult, in amici's view, to square the proscription of such rhetorical hyperbole -- involving some of the most passionately held feelings and beliefs of competing racial groups -- with the robust freedom of expression guaranteed by the First Amendment.

Even under strict common law principles, there was no need to reach this result. When -- as here -- a publication sets forth the facts on which its rhetorical conclusions are based -- however meagre one might consider the facts and however

---

(footnote continued)

currently utilize these terms to voice their innumerable real and imagined grievances. Indeed, it would not be difficult to find a newspaper which contains a complaint by one party against another for some action allegedly grounded in 'racism,' or 'reverse racism.'" Appendix to the Petition for Certiorari at 30 (hereinafter "Pet. App. __").

questionable one might find the conclusions from a more disinterested perspective -- such a publication has long been held to be protected from a claim of defamation. See, e.g., Restatement (Second) of Torts §566 comment c, illustration 4 (1977).

In such cases, the reader or listener is considered perfectly capable of evaluating the bases, or lack thereof, for the charges being made and of understanding the hyperbolic nature of the publication. The common law recognizes that even argumentative, unreasonable or intemperate opinions are entitled to be formed, and that their expression is equally protected. Relatedly, the common law has long considered obvious hyperbole and vituperation to be privileged because "a certain amount of vulgar name-calling is

frequently resorted to ... and it is properly understood by reasonable listeners to amount to nothing more." Id. §566 comment e.

Similar principles have been adopted by this Court as constitutionally-based limitations on libel actions. In Greenbelt Cooperative Pub. Assoc. v. Bresler, 398 U.S. 6 (1970), a case that also involved biting public debate over a proposed real estate development, this Court held that such hyperbolic characterizations must be absolutely protected as a matter of First Amendment law. In Greenbelt, the epithet "blackmail" had been leveled at a real estate developer. This Court held "that as a matter of constitutional law, the word 'blackmail' in these circumstances was not slander when spoken and not libel when reported." Id. at 13. In

such context -- a public debate over pending land negotiations -- "even the most careless reader must have perceived that the word [blackmail] was no more than rhetorical hyperbole, a vigorous epithet used by those who considered [the developer's] negotiating position extremely unreasonable." Id. at 14 (emphasis added). Accord, Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin, 418 U.S. 264, 286 (1974) (holding that use of the epithet "traitor" in the context of a labor dispute was "merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members towards those who refuse to join."). See also Cafeteria Employees Union, Local 302 v. Angelos, 320 U.S. 293, 295 (1943) (protecting, in a

non-libel action, a charge during World War II that a business was "aiding the cause of Fascism;" holding that such hyperbolic characterization must be distinguished from the "falsif[ication of] facts" and merely reflects "loose language or undefined slogans that are part of the conventional give-and-take in our economic and political controversies ...")

POINT II - The Finding of Actual Malice Was Based on a Constitutionally-Improper Standard and Analysis

It is settled law, established in a long and unbroken line of decisions by this Court, that "actual malice," for purposes of constitutional libel actions, must be evaluated on the basis of a "<u>subjective</u>" standard. The focus

of the subjective standard is upon the state of mind of the libel defendant at the time of publication. That is, whether the defendant actually knew the publication was false, or else whether the defendant published a falsehood "with a high degree of awareness of its probable falsity," in the sense that the defendant had "in fact entertained serious doubts as to the truth of his publication," Garrison v. Louisiana, 379 U.S. 64, 74 (1964); St. Amant v. Thompson, supra, 390 U.S. at 731 (emphasis added). See also Curtis Publishing Co. v. Butts, 388 U.S. 130, 153 (1967) (plaintiffs must "prove that the publication ... was deliberately falsified, or published recklessly despite the publisher's awareness of probable falsity"); Bose Corp. v. Consumers Union, 466 U.S. 485, 511 n.30

(1984) (defendant must have "realized the inaccuracy of the statement, or entertained serious doubts about its truthfulness, at the time of publication") (emphasis added).

In adopting this specifically subjective standard, this Court has expressly rejected an "objective," or "reasonable conduct," test. "The reasonable-belief standard ... is not the same as the reckless-disregard-of-truth standard." Garrison v. Louisiana, supra, 379 U.S. at 79. See also St. Amant v. Thomson, supra, 390 U.S. at 731 ("[R]eckless conduct is not measured by whether a reasonably prudent man would have published..."); Bose Corp. v. Consumers Union, supra, 466 U.S. at 513 (actual malice is not established "simply because an intelligent speaker would have to know

that the term is inaccurate...").

The court below violated these settled principles, an error of clear constitutional dimension. It expressly applied an objective standard in its review of the actual malice finding. "[E]valuation of this element of proof," the court held, "must be from an objective standpoint, not merely from a subjective perspective." (emphasis added)(Pet. App. 101-02) The court thereupon evaluated petitioner's publication in terms of such allegedly "objective" criteria focusing largely on those elements petitioner had labelled as "racism." It found that petitioner had acted unreasonably because "he accused [respondent] of racial prejudice without any objective basis for the charge;" because he "had no proper grounds to suppose" that

respondent "was oppressing other individuals;" and because he "recklessly stated that [respondent's] opposition to [petitioner's] development on pollution grounds was a 'sham' to conceal his supposed real purpose, i.e., oppression of black citizens..." (emphasis added)*

The court completely failed to identify or discuss petitioner's subjective state of mind in relation

---

* The court below also considered as evidence of actual malice statements made about respondent's "tenured" university professorship and the suggestion that such a professorship was "living off the 'public dole' at the expense of working people." (Pet. App. 102) It is hard to understand how such statements do not represent fair and protected commentary based upon the undisputed fact of respondent's tenure at a public university. The court also considered as pertinent to actual malice what it found was petitioner's motive "to intimidate [respondent] in order to eliminate the voice of a

(footnote continued)

to the charge of racism. It did not find that defendant was in fact aware of the falsity of the charge or that he realized it was in error; nor did the court point to any evidence that would have formed a basis for such findings.

Finally, as discussed in Point I, supra, the court failed adequately to consider whether the charge of "racism," and the underlying statements surrounding that charge, were protected rhetorical hyperbole. Nor did it find that the charge of "racism" was an opinion not actually held by the

---

(footnote continued)

leading opponent." (Id.) This holding also defies a principle long settled by this Court that equating a libel defendant's spite, hostility, ill-will or desire to injure the plaintiff with actual malice is an "error of constitutional magnitude." Greenbelt Publishing Co. v. Bresler, supra, 398 U.S. at 10; Beckley Newspapers Corp. v. Hanks, 391 U.S. 81, 82 (1967).

petitioner. Its affirmance of the punitive damage award, thus premised on such protected statements, also necessarily erred in failing to identify a false statement of fact published with actual malice, for by definition actual malice cannot be established regarding opinions and beliefs. "[T]here is no such thing as a false idea." Gertz v. Robert Welch, Inc., supra, 418 U.S. at 339. And, as the Second Circuit has wisely observed, "[a]n assertion that cannot be proven false cannot be held libelous." Hotchner v. Castillo-Puche, 551 F.2d 910, 913 (2d Cir. 1976), cert. denied sub. nom. Hotchner v. Doubleday & Co., 434 U.S. 834 (1977).

POINT III - The Damage Award Violates the First Amendment

A. An Award Approaching $250,000 is Grossly Excessive Under the Circumstances

Amici ask this Court to take notice of disturbing trends in libel damage awards over the past several years, some of which are charted and summarized in Appendix A and Appendix B hereto. Particularly in light of these trends, amici submit that the Court should be prepared to exercise its power of review in order to assure that excessive libel awards are not upheld and that sufficient legal constraints are recognized so as to prevent the chilling effects of such awards in future cases.

While the greatest excesses in libel damage awards may have been experienced by media libel defendants, this

escalation of libel damages can also impact severely on all libel defendants, including private citizens such as petitioner. Indeed, an award of nearly a quarter of a million dollars can be as monstrously out of proportion to an individual's circumstances and culpability as are the million and multi-million dollar libel awards that are today regularly being assessed by juries against corporate, media defendants.

The courts below also failed to take into account that this onerous award was also unnecessary, at least in the sense that plaintiff was apparently not without the means to remedy any threatened injury by the constitutionally-preferred antidote to one-sided expression. First Amendment freedoms could not long survive were every subject of an intemperate remark

to hale his opponents into the courts in defamation actions, thereby imposing all of the attendant costs of litigation, rather than simply answering the charges made in the context of open public debate.

B. The Compensatory Award Violates Constitutional Limitations on Actual Damages in Libel Actions

It is against this background that the damages awarded to the respondent must be assessed. From that perspective the conclusion is unavoidable, amici submit, that the award violates constitutional limitations previously recognized by this Court.

In Gertz v. Robert Welch, Inc., supra, 418 U.S. at 323, while the Court acknowledged that states have a legitimate interest in compensating for defamatory falsehoods, it also held that

this interest reaches no farther than compensation for actual injury. Only in this manner can the "largely uncontrolled discretion of juries to award damages where there is no loss" be controlled. And only by this means can the courts avoid "unnecessarily compound[ing] the potential of any system of liability for defama[tion] ... to inhibit the vigorous exercise of First Amendment freedoms." Id. at 349.

In fact, the court below found that the jury in this action had awarded excessive damages where there was no loss. It held that the "compensatory" damage award of $100,000 was "so out of proportion to the damage sustained as to be excessive as a matter of law." It found that respondent "experienced no physical manifestation of any emotional distress ... sought no medical attention

for any condition resulting from the publication ... [and] there was no evidence that Moore's [professional] standing with his peers was diminished." (emphasis added) To the contrary, the court found that respondent "continues to be held in high esteem among his community of friends and colleagues." (Pet. App. 98)

And, finally, although the court did find that respondent may have suffered a certain degree of "embarrassment" and "humiliation" and some "loss of reputation" -- at least among others than his peers, colleagues and community of friends -- it concluded that the jury's verdict bore "no reasonable relation" to whatever lesser damages may have been sustained.

Amici respectfully submit that, in the circumstances, remittitur by a

factor of only one-third, leaving a compensatory award approaching $75,000, violates the constitutional mandate, defined by this Court, to confine compensation to "reasonable" awards for "actual" injury, as opposed to "gratuitous" awards, "far in excess of any actual injury."

C. The Punitive Damage Award Also Violates the First Amendment

This Court has long recognized that the traditional concept of punitive damage awards cannot easily be harmonized with our national commitment to the uninhibited exercise of First Amendment freedoms. The Court's analysis teaches that punitive damages in libel actions are disfavored and, at the very least, that any punitive award

must be carefully scrutinized.*

In New York Times Co. v. Sullivan, this Court made clear that a substantial motivation for any development of constitutional limitations on the common law of libel was the potential chilling effect of the imposition of massive damage awards.**

In Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), although the majority affirmed a punitive damage

---

* Recently, Chief Justice Burger noted that even in a non-libel action a constitutionally-based challenge to a huge and disproportionate punitive damage award "raise[s] important issues which, in an appropriate setting, must be resolved..." Aetna Life Ins. Co. v. Lavoie, 106 S.Ct. 1580, 1589 (1986).

** It is noteworthy that the award in Sullivan -- against one of the nation's great corporate newspaper publishers -- was not much more than twice as large as the award imposed here.

award, Justice Harlan was careful to note that punitive damages were traditionally strictly limited under common law and that the First Amendment at minimum requires "judicial control over excessive awards ... based on jury prejudice." Id. at 160.

Thereafter, these concerns led to open condemnation of punitive damages by Justices Marshall and Stewart who argued on constitutional grounds, in Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971), for outright elimination of the discretion to impose such exemplary awards.

Even Justice Harlan, who had voted to affirm a punitive award in Curtis Publishing Co. v. Butts, although he did not concur in an across-the-board ban on punitive damages, agreed in Rosenbloom that "substantial punitive

damage awards [are] likely to induce self-censorship," id. at 72, and would have held that punitive damages are:

> "unconstitutional, in a private libel case, ... unconfined by the requirement that these awards bear a reasonable ... relationship to the actual harm done." Id. at 77.*

Finally, of course, these developing concerns led to the outright elimination, in Gertz v. Robert Welch, Inc., supra, 418 U.S. 323, of punitive damages at least in those cases where "the private defamation plaintiff establishes liability under a less

---

* Recently, Mr. Justice White made reference to Justice Harlan's views in Rosenbloom in commenting that the limitations on presumed and punitive damages suggested by Justice Harlan might have served as an alternative means of protecting the press from the undue chilling effects of "intimidating damages liability." Dun & Bradstreet v. Greenmoss, supra, 86 L.Ed.2d at 610 (1985) (concurring opinion).

demanding standard than that stated by New York Times. . ." Id. at 350 The basis of this holding, echoing all of the concerns of Justices Marshall, Stewart and Harlan, was the dangerous conflict between awards of punitive damages and the constitutional considerations that underlay New York Times:

> "[J]uries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views... [J]ury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship..." Id.

Here, all of the concerns that are reflected in this Court's previous rulings on punitive damages in libel actions are presented. The court below held that the original jury award of

punitive damages was "a forbidden intrusion on the exercise of free expression and [was] substantially in excess of adequate punishment for [petitioner's] conduct." In fact, the award was held to be "not merely punitive, [but] destructive." The court found that the award had no "reasonable relationship to the actual damages sustained and to the measure of punishment required" and held that the punitive award "on its face indicates prejudice or partiality ... and cannot stand." (Pet. App. 105)

Given the court's recognition of these pervasive defects in the original punitive award amici submit that the minimal remittitur it ultimately approved was wholly inadequate to cure these constitutional concerns.

D. Libel Awards Violative of the First Amendment Should Be Reversed and Not Merely Remitted

Although this Court has never expressly so held in the context of a libel damage award, amici respectfully submit that when a jury's initial damage award evidences pervasive defects such as those found by the court below, then the First Amendment requires that the award not simply be remitted, but that it should be reversed outright.

Support for such a holding is found in Justice Holmes' dissenting opinion in Abrams v. United States, 250 U.S. 616 (1919). In that case sentences of twenty years imprisonment had been imposed based upon the author's publication of two leaflets. Justice Holmes, in dissent, would have held that the leaflets were absolutely

protected under the First Amendment. But even assuming that the expression could constitutionally have been punished, Justice Holmes found a separate and equally weighty First Amendment infirmity in the degree of punishment inflicted, "unless," as Justice Holmes put it, "the defendants are to be made to suffer not for what the indictment alleges but for the creed that they avow..."

It is constitutionally impermissible, Justice Holmes was suggesting, to impose excessive punishment based not upon the proscribable aspects of the defendant's actions, but rather upon a generalized distaste for the defendant's protected beliefs or manner of expression. Where it is clear that such excessive punishment has been imposed, the

underlying verdict is itself presumptively tainted by an impermissible motive to punish disfavored expression.

As one leading commentator has noted with reference to Abrams and in the specific context of libel damage awards:

> "To the extent that the passion and prejudice of the jury [as reflected in excessive damage awards] reflects an antagonism to the defendant's publication ... libel defense attorneys [ought to be] entitled to a new trial regardless of plaintiff's willingness to accept [a remitted] award .... There is typically no way of determining the extent to which that taint equally affected the jury's determination [of liability] ... and not merely the determination of appropriate damages." Van Alstyne, First Amendment Limitations on Recovery from the Press, 25 Wm. & Mary L.Rev. 793, 807-08 (1984).

POINT IV - The "Independent" Review Required in Constitutional Libel Actions Mandates Grant of the Petition on All Three Issues*

A. An Erroneous Actual Malice Finding Should Be Reviewed

The court below recognized its constitutional obligation independently to review the record, but only with respect to the issues of actual malice and punitive damages. Unfortunately, the court's independent review failed to identify the constitutional error that underlay the punitive damage award.

---

* Amici do not address Question 3 of the petition, regarding the racial composition of the juries in this action, which is addressed in the separate amicus curiae brief of the NAACP. Amici note, however, their concern that juries in libel actions may be inclined to substitute emotion for reason, or personal predilection for legal and constitutional limitations, in judging controversial or unpopular expression -- a concern shared by this Court. See, e.g., Gertz

(footnote continued)

When a lower court purports to undertake an independent review of the record regarding the existence of actual malice, but when that review without doubt applies an incorrect legal standard and thereby leaves standing obvious, uncorrected error of constitutional dimension on the very issue mandated for independent examination, then this Court should itself be prepared to exercise its

---

(footnote continued)

v. Robert Welch, Inc., supra, 418 U.S.at 350 (juries may "use their discretion selectively to punish ... unpopular views"); Rosenbloom v. Metromedia, Inc., supra, 403 U.S. at 84 (juries may "penalize heavily the unorthodox and the unpopular and exact little from others."). Such First Amendment-related concerns may well be exacerbated when arbitrary or discriminatory factors are permitted to influence the selection of jurors. This would be particularly so when those factors are directly related to the controversial nature of the publication under consideration.

power of certiorari in order to assure that First Amendment rights are held inviolate.

Presumably this Court is not literally bound under the independent appellate review doctrine to review every claim of error involving the actual malice issue in a libel action. However, at least as a prudential matter, this Court should step in when significant error of constitutional dimension is apparent on the face of a libel petition and when a substantial if not excessive libel judgment will otherwise be finally enforced based upon such constitutionally-erroneous findings.

To fail to grant certiorari in such circumstances would violate at least the spirit of Justice Stevens' eloquent recognition for this Court only two

Terms ago that:

> "the requirement of independent appellate review ... reflects a deeply held conviction that judges -- and particularly members of this Court -- must exercise such review in order to preserve the precious liberties established and ordained by the Constitution." (emphasis added) Bose, supra, 466 U.S. at 510-11.

B. The Failure to Consider a Question of Constitutional Dimension, Such as First Amendment Protection for Hyperbole, Mandates Review by this Court

1. Protection of Hyperbole is a First Amendment Interest Requiring Independent Review

In reviewing the judgment, the court below entirely failed to consider petitioner's continuing contention that his advertisement was an expression of opinion protected by the First Amendment. (Pet. App. 51, 265).

The failure even to consider whether a publication involves

protected expression is clearly an error of constitutional dimension. In fact, this Court has expressly applied the requirement of independent review to the necessary and sensitive task of evaluating the meaning of a publication in terms of constitutional protection for rhetorical hyperbole. Greenbelt Pub. Assn. v. Bresler, supra, 398 U.S. at 11-15.

Where a lower appellate court has entirely failed to review such an issue this Court should, at minimum, give the most careful scrutiny to a petition raising a serious claim of constitutional error involving that issue.

2. In Granting the Petition this Court Need Not Delineate the Full Contours of Constitutional Protection for Statements of Opinion

The petition correctly makes note of numerous cases, in the lower state and federal courts, fleshing out the many ramifications of the opinion vs. fact dichotomy in the law of defamation. Amici believe, however, that this case can be resolved without undertaking, as might seem to be invited by the petition, to write an abstract and wide-ranging treatise on what Justice Rehnquist correctly notes has been the "rich and complex history of the struggle of the common law to deal with this problem." Ollman v. Evans, 105 S.Ct. 2662, 2663-64 (1985) (Rehnquist, J. dissenting to the denial of certiorari). As argued in Point I, supra, the narrower ground on which the

petition should be granted, and the judgment overturned, is to be found in the Court's previous recognition of constitutional protection for the specific category of rhetorical hyperbole.

C. Certiorari Should Be Granted to Prevent the Imposition of Excessive and Unconstitutional Libel Damage Awards

Amici respectfully submit that the same First Amendment concerns which require stringent limitations on libel damages also mandate this Court's most careful scrutiny in reviewing a petition that challenges the enforcement of an excessive or otherwise constitutionally-suspect libel damage award. The court below paid lip service to the need to guard against excessive damages, but

ultimately failed to prevent the enforcement of an unconstitutional award. The fact that such an award is now final and will be enforced unless this Court intervenes, weighs heavily in favor of the grant of certiorari at this juncture in order to assure that excessive damage awards are not imposed in violation of petitioner's First Amendment rights.*

---

* One leading commentator, in reviewing this Court's actions granting and denying libel petitions over the past several years, has noted with some surprise that the Court denied all of the petitions filed during that period seeking review of final damage awards; instead, each of its grants of certiorari involved non-final judgments. Franklin, Foreword: Five Years of Cases at the Supreme Court Door -- A Look at the Quiet Side, published in LDRC 50-State Survey 1985-86: Current Developments in Media Libel and Invasion of Privacy Law at xxi (Libel Defense Resource Center 1986).

Conclusion

The petition for a writ of certiorari to the Supreme Court of Virginia should be granted and the judgment reversed.

Respectfully submitted,

Henry R. Kaufman
Attorney for Amici Curiae
404 Park Avenue South
New York, New York 10016
(212) 889-2308

Of Counsel:

Samuel E. Klein
Kohn, Savett, Klein & Graf, P.C.
2400 One Reading Center
1101 Market Street
Philadelphia, Pennsylvania 19107
(215) 238-1700

Sam Antar
Capital Cities/ABC, Inc.
1330 Avenue of the Americas
New York, New York 10019
(212) 887-4013

August 6, 1986

APPENDICES

APPENDIX A --

Recent Trends in Libel Damage Awards Against the Media*

(1) The Size of Recent Media Damage Awards

According to the Libel Defense Resource Center the average (mean) initial damage award in eighty-one media libel actions tried between 1980 and 1984 that resulted in a plaintiff's verdict was in excess of $2 million. LDRC Bulletin No. 11 (November 15, 1984) at 18 (Table B-9). Even eliminating the distorting effects of three awards of over $10 million, the average award during this period still exceeded three-quarters of a million

---

* Based upon data and analyses prepared and published by the Libel Defense Resource Center (LDRC), New York, New York.

dollars. The average award during a period of several months in 1985, when no eight-figure awards were recorded, was almost $1.8 million dollars. LDRC Bulletin No. 16 (March 15, 1986) at 44.

In terms of the sheer numbers of huge awards, LDRC has reported some thirty libel damage awards at or in excess of $1 million since 1980. See Appendix B, infra. In contrast, only three media libel awards at the million-dollar level were reported in the previous two decades.

In terms of the relative numbers of huge awards, the pace of million-dollar libel damages has also dramatically increased, according to LDRC data. In the pre-Sullivan decade, of thirty-eight libel damage awards initially entered only one was in excess of $1 million -- see Section

(iii), infra. In contrast, in the period 1980-84, almost 25% of the awards in media libel actions exceeded a million dollars. LDRC Bulletin No. 4 (Part 1) (August 15, 1982) at 8-17; LDRC Bulletin No. 11, supra, at 25-34 (listing cases and awards). In the last several months of 1985, more than half of the media libel awards recorded by LDRC exceeded the million-dollar mark. LDRC Bulletin No. 16 (March 15, 1986) at 44.

(ii) Punitive Damage Awards in Recent Media Libel Actions

Almost three out of five of the damage awards recorded by LDRC during the period 1980-84 included an award of punitive damages. More than one-third of those punitive awards was in excess of $1 million. Indeed, the average punitive award in those cases was

substantially in excess of $2.5 million. During the last two years of the period, the average punitive damage award was almost $3 million. In terms of dollars awarded, during the period punitive damages accounted for some 80% of the total amount of damages awarded. LDRC Bulletin No. 11, supra, at 14-15.

(iii) Comparison Data: Average Damage Awards in the Decade Prior to New York Times Co. v. Sullivan

To put these data into further perspective the LDRC recently compiled a historical review of damages awarded in the decade prior to this Court's decision in New York Times Co. v. Sullivan. LDRC found that, in contrast to current trends, the average media libel award during the pre-Sullivan period, excluding the distorting

effects of the single million-dollar award during that entire decade, was under $50,000. LDRC Bulletin No. 17 (July 31, 1986). Indeed, the total amount of the awards in thirty-seven pre-Sullivan media libel cases reporting damage figures (again excluding the single million-dollar verdict) was $1,839,468. This total for thirty-seven cases is less than a single average case in today's world of libel litigation. While adjusting for inflation accounts for some portion of this massive disparity, LDRC reports that even in constant dollars today's media libel damage awards remain between 400% and 500% higher than the pre-Sullivan decade. Id.

(iv) Comparison Data: Media Libel Awards Compared to Damages in Other Areas of Tort Litigation

LDRC has published data comparing

and contrasting these libel trends with damage trends in two other areas of civil tort litigation -- medical malpractice and product liability -- that are also widely cited as having experienced a pattern of wild damage inflation. These non-libel torts often involve extensive economic injury and severe long-term physical debilitation. Nonetheless, libel actions against the media which rarely entail substantial economic loss, and even less frequently have provable physical impact, were found to yield higher average damage awards. The average damage award in medical malpractice actions for the period 1980-84 was slightly in excess of three-quarters of a million dollars. (When million-dollar malpractice awards were excluded this figure dropped to

under a quarter of a million dollars.) The average damage award in product liability actions for that same period was just under a million dollars. (When million-dollar product liability awards were excluded this figure dropped to just over a quarter of a million dollars.) Jury Verdict Research, Inc., Injury Valuation Reports: Current Award Trends, No. 304 (1986) at 18-19.

As for the frequency of million-dollar awards in these comparison areas, between 1980 and 1984 million-dollar awards were entered in 24% of product liability cases -- under the 25% frequency in media libel actions. The frequency of million-dollar awards in medical malpractice actions was lower still -- 21% during the same period. Id.

In contrast to the notable frequency with which punitive damages are being awarded against the media in libel actions, a recent study indicates that during a period ranging from 1981 to 1984 punitive damages were awarded in a relatively low percentage of all civil cases involving an award of money damages. In two-thirds of the thirty-two reporting locations winning plaintiffs were awarded punitive damages less than 10% of the time. In New York City, Chicago and Los Angeles, for example, punitive damages were awarded in 1.6%, 2.2%, and 8.6% of the cases in which money damages were awarded, respectively. Imposition of punitive damages ranged from 0% in some locations to a maximum of 21.6% in the county with the highest rate of punitive awards. All locations

reported lower percentages than the recent average for punitive awards in media libel actions. Daniels, Punitive Damages: The Real Story, 72 ABA Journal 60 (August 1, 1986).

APPENDIX B --

Recent Million-Dollar Awards in Media Libel, Privacy and Related Cases and their Disposition*

1. Beckham v. Sun News (S.C. 1986) -- $1.0 million (compensatory damages), $2.5 million (punitive damages), $3.5 million (total damages); reversed and remanded.

2. Brown & Williamson v. Jacobson (Seventh Cir. 1983) -- $3.0 million (compensatory damages), $2.05 million (punitive damages), $5.05 million (total damages); post-trial motions pending.

3. Burnett v. National Enquirer (Cal. 1981) -- $0.3 million (compensatory damages), $1.3 million (punitive damages), 1.6 million (total damages); award reduced post-trial to $800,000; further reduced on appeal to $150,000.

4. Costello v. Capital Cities Communications (Ill. 1985) -- $0.45 million (compensatory damages), $0.6 million (punitive damages), $1.05 million (total damages); intermediate appeal pending.

---

* Based upon data compiled and published by the Libel Defense Resource Center, New York, New York.

5. Cramlet v. Multimedia Program Productions, Inc. (Tenth Cir. 1983) -- $1.7 million (compensatory damages), $4.2 million (punitive damages), $5.9 million (total damages); remanded for new trial on damages.

6. Douglas v. Hustler (Ill. 1983) -- $0.5 million (compensatory damages), $2.0 million (punitive damages), $2.5 million (total damages); reversed and remanded.

7. Edghill v. Philadelphia Magazine (Pa. 1983) -- $2.0 million (compensatory damages), $5.0 million (punitive damages), $7.0 million (total damages); post-trial motions pending.

8. Fletcher v. San Jose Mercury News (Cal. 1986) -- $1.01 million (total damages); post-trial motions pending.

9. Green v. Alton Telegraph Printing Co. (Ill. 1982) -- $6.7 million (compensatory damages), $2.5 million (punitive damages), $9.2 million (total damages); no appeal taken, and case reportedly settled for more than $1 million, because defendant financially unable to obtain appeal bond.

10. Guccione v. Hustler (Second Cir. 1985) -- $1 (compensatory damages), $1.6 million (punitive damages), $1.6 million (total damages); appeal pending.

11. Guccione v. Hustler Magazine (Ohio 1981) -- $3.3 million (compensatory damages), $37.0 million (punitive damages), $40.3 million (total damages); damage award reversed by intermediate appellate court.

12. International Security Group v. The Outlet Co. (Tex. 1983) -- $0.6 million (compensatory damages), $1.0 million (punitive damages), $1.6 million (total damages); award reduced post-trial to $850,000. Appeal denied by highest state court.

13. Kerr v. El Paso Times (Tex. 1984) -- $0.5 million (compensatory damages), $3.0 million (punitive damages), $3.5 million (total damages); reversed and dismissed by intermediate appellate court.

14. Lerman v. Flynt Distributing Co. (Second Cir. 1980) -- $7.0 million (compensatory damages), $33.0 million (punitive damages), $40.0 million (total damages); award reduced post-trial to $10,000,000; reversed and dismissed.

15. Levine v. CMP Publications (Fifth Cir. 1983) -- $1.009 million (compensatory damages), $0.5 million (punitive damages), $1.509 million (total damages); award reduced post-trial to $300,000.

16. Lipscomb v. Richmond News (Va. 1983) -- $1.0 million (compensatory damages), $0.045 million (punitive damages), $1.045 million (total damages); award reduced post-trial to $100,000.

17. Locricchio v. The Evening News Association (Mich. 1985) -- $3.0 million (compensatory/total damages); post-trial motions pending.

18. Machleder v. Diaz (Second Cir. 1985) -- $0.25 million (compensatory damages), $1.0 million (punitive damages), $1.25 million (total damages); appeal pending.

19. McCoy v. The Hearst Corp. (Cal. 1979) -- $3.0 million (compensatory damages), $1.56 million (punitive damages), $4.56 million (total damages); affirmed by intermediate appellate court; further appeal, granted by highest state court, pending.

20. Miskovsky v. Oklahoma Publishing Co. (Ok. 1980) -- $0.035 million (compensatory damages), $0.965 million (punitive damages), $1.0 million (total damages); reversed and dismissed by highest state court.

21. Postill v. Booth (Mich. 1980) -- $0.3 million (compensatory damages), 0.7 million (punitive damages), 1.0 million (total damages); reversed and dismissed by intermediate appellate court.

22. Pring v. Penthouse International (Tenth Cir. 1981) -- $1.51 million (compensatory damages, $25.025 million (punitive damages), $26.535 million (total damages); award reduced post-trial to $14.035 million; reversed and dismissed on appeal.

23. Rayzor v. A.H. Belo Corp. (Tex. 1981) -- $1.0 million (compensatory damages), $1.0 million (punitive damages), $2.0 million (total damages); reversed and dismissed by intermediate appellate court.

24. Re v. Wilmington News Journal (Del. 1983) -- $1.3 million (compensatory/ total damages); damages set aside as excessive by highest state court and remanded.

25. Rogers v. Doubleday (Tex. 1982) -- $2.5 million (punitive/total damages); affirmed by intermediate appellate court; then reversed and dismissed by highest state court.

26. DiSalle v. Pittsburgh Post Gazette (Pa. 1985) -- $0.21 million (compensatory damages), $2.0 million (punitive damages), $2.21 million (total damages); post-trial motions pending.

27. Sisler v. Gannett Co. (N.J. 1983) -- $1.05 million (total damages); affirmed by intermediate appellate court; further appeal pending.

28. Sprague v. Philadelphia Inquirer (Pa. 1983) -- $1.5 million (compensatory damages), $3.0 million (punitive damages), 4.5 million (total damages); reversed and remanded.

29. Tavoulareas v. Washington Post Co. (D.C. Cir. 1982) -- $0.25 million (compensatory damages), $1.8 million (punitive damages), $2.05 million (total damages); reversal of judgment n.o.v. vacated; rehearing en banc pending.

30. Thomson v. Combined Communications, Corp. (Ky. 1985) -- $2.6 million (compensatory damages), $0.3 million (punitive damages), 2.9 million (total damages); post-trial motions pending.

85-2168

NO.

Supreme Court, U.S.
FILED
AUG 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1985

JAMES N. FLEMING,

Petitioner

v.

W. BEDFORD MOORE, III

Respondent

RESPONSE TO MOTION OF THE PHILADELPHIA INQUIRER AND CAPITAL CITIES/ABC, INC. FOR LEAVE TO FILE BRIEF, AS AMICI CURIAE, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Thomas E. Albro
SMITH, TAGGART, GIBSON & ALBRO
105-109 East High Street
Post Office Box 1585
Charlottesville, Virginia 22901
Telephone: (804) 977-4455

Counsel for the Respondent

APPELLATE PRINTING SERVICES, INC., HERITAGE BLDG., RICHMOND, VA (804) 643-7789

8 pp

No. 85-2168

IN THE

SUPREME COURT OF THE UNITED STATES
October Term, 1985

JAMES N. FLEMING,

Petitioner

v.

W. BEDFORD MOORE, III,

Respondent

RESPONSE TO MOTION OF THE PHILADELPHIA INQUIRER AND CAPITAL CITIES/ABC, INC. FOR LEAVE TO FILE BRIEF, AS AMICI CURIAE, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Respondent, W. Bedford Moore, III, hereby responds to the Motion for Leave to File Brief, as amici curiae, filed by the Philadelphia Inquirer and Capital Cities/ABC, Inc. as follows:

I. Respondent Objects to Points I, II, IV of Amici's Brief Since Those Points Discuss Issues That Are Not Properly Before the Court and Are Issues That Have Been Previously Considered and Disposed of By The Court.

In points I, II, IV the amici attempt to bring to the attention of the Court first amendment issues that are clearly not properly perfected issues for the Court to consider in its review of this petition. Whether petitioner's allegations of racism were opinions or statements of fact was previously briefed by petitioner and his petitions were denied certiorari in Record Nos. 84-382 and 84-1740. While there can be no doubt that the amici share petitioner's interest in reclassifying the defamation--more than ten years after its publication--as a statement of opinion, this issue is simply one that is not properly before the Court.

Points II and IV raised by amici, likewise, are not issues before this Court. Those issues were not raised in the Virginia Supreme Court appeal from which this petition for a writ is taken. Petitioner concedes that all of his federal constitutional issues were presented to both the Circuit Court of Albemarle County and to the Supreme Court of Virginia in an appeal prior to the appeal at issue here. See Fleming v. Moore, sub nom Gazzett v. Harris, 229 Va. 1, 325 S.E.2d 713 (1985). Petitioner also concedes that the Virginia Supreme Court's affirmance of compensatory and punitive liability in Fleming v. Moore, supra constituted a final ruling on the federal constitutional issues involved in the affirmance of that liability, as well as on the federal constitutional issues over which the Supreme Court of

Virginia declined to exercise jurisdiction. Those federal issues were presented to this Court in Record No. 84-1740, which was denied certiorari. See Petition for Writ of Certiorari, Record No. 84-1740, page 4.

To permit those issues to be briefed by the amici would be a waste of the Court's time and resources.

II. Respondent Does Not Object to the Brief of Amici as it Relates to Point III Discussed Therein Since That Point Is Properly Before the Court.

Point III of the amici's brief is the only issue discussed therein that relates to the issue before this Court. Since the size of the state court verdict is a proper issue, respondent has no objection to this segment of the amici's brief being considered.

WHEREFORE, respondent W. Bedford Moore, III respectfully requests that the Motion for Leave to File Brief, as Amici Curiae, by the Philadelphia Inquirer and Capital Cities/ABC, Inc. in support of petitioner's brief for writ of certiorari be denied as it relates to Points I, II, and IV therein. Respondent has no objection to Point III of the amici's brief.

W. BEDFORD MOORE, III

By Counsel

Counsel:

Thomas E. Albro
SMITH, TAGGART, GIBSON & ALBRO
105-109 East High Street
Post Office Box 1585
Charlottesville, Virginia 22901
Telephone: (804) 977-4455

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of August, 1986 I served three (3) photocopies of the foregoing Response to the following counsel of record in this case:

D. Alan Rudlin
W. Jeffrey Edwards
HUNTON & WILLIAMS
Post Office Box 1535
Richmond, Virginia 23221

J. Benjamin Dick
421 Park Street
Suite 2
Charlottesville, Virginia 22901

S. W. Tucker
Hill, Tucker & Marsh
Post Office Box 27363
Richmond, Virginia 23261

Gerald G. Poindexter
Surry Courthouse Square
Surry, Virginia

Grover G. Hankins
General Counsel NAACP
805 Mount Hope Drive
Baltimore, Maryland 21215

J. Levonne Chambers
Eric Schnapper
NAACP Legal Defense and Educational
Fund, Inc.
16th Floor
New York, New York 10013

Henry R. Kaufman
404 Park Avenue South
New York, New York 10016

Kay Craig

85-2168

Supreme Court, U.S.
FILED
JUN 26 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JAMES N. FLEMING,

Petitioner,

v.

W. BEDFORD MOORE, III,

Respondent.

BRIEF OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AS AMICUS CURIAE

GROVER G. HANKINS,
General Counsel,
CHARLES E. CARTER,
Associate General Counsel,
EVERALD THOMPSON,
Assistant General Counsel,
NAACP,
4805 Mt. Hope Drive,
Baltimore, Maryland 21215,
(301) 358-8900.

The Daily Record Co., Baltimore, MD 21202

13 pp

QUESTION PRESENTED FOR REVIEW

Whether Petitioner's constitutional right to equal protection of the laws was violated in the specific circumstances of this case, because Respondent exercised his peremptory strikes to create a jury without blacks.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	ii
INTEREST OF THE *AMICUS CURIAE*	1, 2
STATEMENT OF THE CASE	2
ARGUMENT:	
Moore's Striking Of All Black Jurors Violated Fleming's Constitutional Right To Equal Protection Of The Laws	2

TABLE OF AUTHORITIES

Cases

Ballard v. United States, 329 U.S. 202 (1965)	7
Batson v. Kentucky, No. 84-6263 (U.S. April 30, 1986)	3, 4, 5, 9
Reitman v. Mulkey, 387 U.S. 369 (1967)	2
Strauder v. West Virginia, 100 U.S. 303 (1880)	8, 9
Swain v. Alabama, 380 U.S. 202 (1965)	3, 5
Taylor v. Louisiana, 419 U.S. 522 (1975)	8

Constitutional Provision

U.S. Constitutional Amendment XIV	2, 9

Law Review Articles

S. W. Tucker, *Racial Discrimination In Jury Selection In Virginia,* 52 Virginia Law Review 736 (1966)	6, 7
Note, *The Case For Black Juries,* 79 Yale L. J. 534-35 (1970)	8

Statutes

Virginia Code 58.01-359(B)	2

85-2168

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JAMES N. FLEMING,

Petitioner,

v.

W. BEDFORD MOORE, III,

Respondent.

BRIEF OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

The National Association for the Advancement of Colored People ("NAACP"), a New York not-for-profit corporation, is an organization devoted to obtaining equal rights for blacks and minority citizens by lawful and peaceful means. The NAACP is a membership corporation with approximately 1700 local affiliates in all fifty states and in the District of Columbia. The basic aims and purposes of the organization are to secure full and equal citizenship rights for blacks and other minorities without restrictions, burdens, limitations or barriers based upon

race or color. The blacks in the United States are engaged in what often seems to be a never-ending struggle against laws, customs, practices, usages and opinions relegating them to inferior status. Evidence of that struggle is apparent in the issue raised in this *amicus curiae*.

STATEMENT OF THE CASE

For the purpose of brevity, the Statement of the Case which appears in the brief of the petitioner is adopted by the National Association for the Advancement of Colored People as *amicus curiae*.

ARGUMENT

MOORE'S STRIKING OF ALL BLACK JURORS VIOLATED FLEMING'S CONSTITUTIONAL RIGHT TO EQUAL PROTECTION OF THE LAWS.

The Fourteenth Amendment by its terms is directed to the states. It provides in pertinent part:

> [n]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[1]

The necessary action to trigger this court's review is present in this case. Respondent's counsel in exercising his peremptory challenges acted in conformity with an apparently neutral state statute that had a discriminatory impact on potential black jurors.[2] Though no exact test has been enunciated for determining the degree to which judicial enforcement of discriminatory laws constitutes state action, this court has tended to find state action in private conduct relying on such laws. *See Reitman v. Mulkey*, 387 U.S. 369 (1967) (invalidating a constitutional amendment which would have prohibited the legislature

[1] U.S. Const. Amend. XIV.

[2] *See* Virginia Code 58.01-359(B).

from passing fair housing laws on the ground that the referendum effectively encouraged and approved racial discrimination). Fleming has met the burden of the state action threshold in this case because the trial judge overruled Fleming's objection to the peremptory striking. The state action becomes more apparent when viewed in the context of a libel trial where race was at the core of the controversy. In this regard, the Virginia statute prescribing the use of peremptory challenges was discriminatory in its application since it was susceptible to perverse manipulation in a way that brought about an all white jury to render a tainted verdict that found a black man guilty of stating that a white man does not want black people "within his sight."

Recently, in *Batson v. Kentucky*, No. 84-6263, Slip Op. at 1 (U.S. April 30, 1986), this court held that a state denies a defendant equal protection of its laws when it puts him on trial before a jury from which members of his race have been purposely excluded. More importantly, this court expressly overruled a portion of its holding in *Swain v. Alabama*, 380 U.S. 202 (1965), which required that an accused who alleges violation of equal protection in jury selection proffer evidence of the state's systematic use of the peremptory challenge to exclude members of his race from the jury venire. Noting that the preceding "evidentiary formulation is inconsistent with equal protection standards," this court held that

> [a] defendant may make a prima facie showing of purposeful discrimination in selection of the venire [or petit jury] by relying solely on the facts concerning its selection in his case.

Slip Op. at 15.

Under the standards articulated in *Batson*, a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on

evidence concerning the prosecutor's use of peremptory challenges at the defendant's trial. In so doing, the defendant first must show that he is a member of a cognizable racial group and that the prosecutor has exercised peremptory challenges to remove members of the defendant's race; that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate"; that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude persons from the petit jury on account of their race. Slip Op. at 16.

This *amicus curiae* asks this court to extend the principles outlined in *Batson* to the use of peremptory challenges in a libel case in which the subject of the controversy dealt wholly with race. Moore was a white professor who alleged that he was libeled when Fleming, a black developer, placed an advertisement in a local newspaper stating that Moore's opposition to the building of a housing complex stemmed from his desire of not wanting to see black people "within his sight." Thus, the nature of this controversy demanded that the trial judge exercise restraint on any peremtory challenges that struck all blacks or all whites from the jury as the case may be.

Admittedly, jury selection procedures in state civil trials are within the exclusive domain of the states. However, discriminatory jury selection procedures that impinge upon the constitutional rights of black citizens should trigger strict scrutiny by this Court. Thus, the *Batson* case is noteworthy for having firmly rested on the Equal Protection clause, and not the Sixth Amendment right to a jury trial which is limited to jury selection for criminal defendants. Further, this *amicus curiae* asks that this Court extend the principles outlined in *Batson* to any civil trial in which black interests are at stake.

Assuming *arguendo,* that this Court agrees to apply *Batson's* standards to the instant case, it is unquestionable that Fleming, a black man, is a member of a cognizable racial group whose right to a fair trial was subverted by the peremptory striking of the two blacks who otherwise would have sat on the petit jury. As the record reflects, defense counsel's timely objection to this flagrant abuse was overruled by the trial judge. This action resulted in Fleming being tried by an all white jury. That jury returned a verdict in excess of $400,000.00 against Fleming because he stated that a white man did not want black people "within his sight."

Fleming is entitled to rely on the fact that peremptory challenges constitute a jury selection practice that permits

> . . . those to discriminate who are of a mind to discriminate . . . In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances. For example, a 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during voir dire examination and in exercising his challenges may support or refute an inference of discriminatory purpose. These examples are merely illustrative.

Slip Op. at 16. In this case the discriminatory inference may be adduced from the mere fact that Moore's counsel struck all the blacks from the jury. The judge did not require that he explain the reason for his challenges.[3] Nothing in the record indicates any disqualifying factors that would have warranted the striking of the black jurors. In fact, the color of their skin was the sole reason why they were targeted for exclusion from the petit jury.

---

[3] Admittedly, the judge may have relied on the flawed holding in *Swain, supra,* which has significantly influenced the use of peremptory challenges in civil trials.

Fleming's counsel was permitted a certain number of strikes.[4] However, Fleming's counsel's exercise of his peremptory challenges (which was not based on racial grounds) does not justify Moore's counsel's striking of the black jurors on racial grounds. In the context of this case, Fleming's counsel could not use his peremptory challenges to produce an all black jury or even a jury that was 50% black. However, Moore's counsel was able to use his peremptory challenges to fashion a jury 100% white.

The inequity of the situation cannot merely be explained by the fortuitous circumstances of chance and demography. Though these factors influence the racial composition of juries across the country, they are by no means controlling. It is the peremptory challenge that is used as the ultimate device for excluding blacks from juries. As Fleming's case demonstrates, two blacks were poised to sit on the jury on the day of trial but the peremptory challenges were applied to exclude them. If the abuse of this device remains unchecked, trial by jury will be forever tainted and the courts will cease to be the last bastion of justice for blacks in this country.

Virginia's record with respect to discriminatory jury selection procedures is legendary.

> The slowness with which reforms have been made emphasizes that corrective action must be undertaken with a deliberateness equal to that with which Virginia achieved the total exclusion of Negroes from juries in the early years of this century. Until such action is taken, juries possess the capacity to be instruments of oppression.[5]

---

[4] This court has expressly reserved the question as to whether the Constitution imposes limits on the exercise of peremptory challenges by defense counsel. Slip Op. at 8, n. 12.

[5] S. W. Tucker, *Racial Discrimination in Jury Selection In Virginia*, 52 Virginia Law Review 736 (1966).

In this case, the deliberate striking of blacks from the petit jury left in place an all white jury that acted as an instrument of oppression when it returned an excessive verdict against a black man. These white jurors were drawn from representatives of the same community that Moore spearheaded when he waged a crusade against Fleming's application for a zoning variance that would have allowed him to build low income housing. There were indications that Moore received substantial support from his white peers in his lobbying of the Albemarle County Board of Supervisors, which effectively denied the application for a zoning variance. Thus, it is not unlikely that these were the same whites who were selected to sit on the jury in the libel trial. Were the blacks present allowed to sit on the jury, they may have been able to offer their white counterparts an enlightened perspective of just what Fleming meant by his advertisement.

> . . . trial juries have a tremendous potential for creating democracy in action. Fulfillment of this potential, however, is precluded by racial prejudices which invade the selection process . . . no other institution conducted under government compulsion has the capacity for bringing together for a common purpose adults who may be likely to represent so many varying experiences, backgrounds, and conditions or stations in life.[6]

In *Ballard v. United States,* 329 U.S. 187 (1946), this court noted that the pernicious effects occasioned by the exclusion of blacks from juries

> are not limited to the defendant — there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the process of our courts.

Exclusion of blacks from juries on racial grounds will foster the perception fairly common in the black

---

[6] *Id.* at 750.

community that the machinery of justice is operated and manipulated by whites to achieve their own aims. Such perception encourages disrespect and distrust of the judicial system. Sadly, racial use of peremptory challenges also perpetuates stereotypical notions of blacks since it questions their abilities to conduct objective fact-finding in trials involving black issues.

> The effect of black exclusion on civil litigation is . . . invidious. The juries are the same; only the stakes are different . . . It is not surprising that neither the jury nor the law has legitimacy for black litigants or the black community, when they so obviously do not work for black people.[7]

Fleming had a right under the equal protection clause to be represented by a jury that was selected from a representative cross-section of the community. This court has held that under the Sixth Amendment a defendant in a criminal trial is entitled to a cross-sectional jury representation. *See Taylor v. Louisiana,* 419 U.S. 522 (1975). In recent times, the court has not had occasion to address whether the Equal Protection Clause requires cross-sectional jury representation in civil trials. However, over 100 years ago, this Court in *Strauder v. West Virginia,* 100 U.S. 303 (1880) in determining that exclusion of blacks from juries violated the 14th Amendment, stated:

> [t]he very idea of a jury is a body of men composed of the peers of the person whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds . . . It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore,

---

[7] Note, *The Case For Black Juries,* 79 Yale L. J. 534-35 (1970).

> operate in some cases to deny to persons of those classes the full enjoyment of the protection which others enjoy.

Strauder, at 308. Quoting in part the exact language above, this Court in *Batson* reaffirmed the principles expressed in *Strauder, supra*, namely that the Fourteenth Amendment entitles a person to be tried by a jury of his peers or equals. Slip Op. at 5. It is submitted that the cross-sectional formulation expressed in *Strauder* and reaffirmed in *Batson*, constitutes a Fourteenth Amendment cross-sectional requirement with respect to civil jury trials.

This is not to say that heretofore all juries in America should consist of a certain quota of blacks. This Court noted in *Batson:*

> [w]e have never held that the sixth amendment requires that 'petit juries actually chosen mirrors the community and reflect the various distinctive groups in the population . . . Indeed, it would be impossible to apply a concept of proportional representation to the petit jury in view of the heterogeneous nature of our society.

Slip Op. at 5 n.6. It would appear that the proscription against proportional jury representation in Sixth Amendment cases also applies to jury selection in Equal Protection cases. Though the court's view on the heterogeneity of this society is well taken, it should be pointed out that the use of the peremptory challenge to exclude blacks from juries artificially distorts the concept of heterogeneity. Placing strict limits on the use of the peremptory challenges in cases where race is at the core of the controversy or where black interests are at stake, may serve to promote juries that more aptly reflect the heterogeneity of our society.

It is hoped that in the future this Court will be able to note "with confidence"[8] that race no longer plays a role in the jury selection process. However, at this time, America remains a racially polarized society. The use of peremptory challenges to exclude blacks from juries exacerbates racial polarization. It is for these reasons that Justice Marshall called for the abolishment of peremptory challenges in criminal trials. Slip Op. at 1 (Marshall, J., concurring). Whether Justice Marshall would require its similar elimination in civil trials where race is the subject of the controversy or where the interests of blacks are at stake, is unclear. Preservation of this weapon merely on the basis of its lengthy tradition and customary use is unfair when weighted against the Equal Protection rights of black litigants. This Court should hold that the use of peremptory challenges to strike black jurors in civil trials where race is at the core of the litigation or where the interests of black litigants are at stake, is inherently suspect.

Respectfully submitted,

GROVER G. HANKINS,
General Counsel,

CHARLES E. CARTER,
Associate General Counsel,

EVERALD THOMPSON,
Assistant General Counsel,

NAACP,
4805 Mt. Hope Drive,
Baltimore, Maryland 21215,
(301) 358-8900.

---

[8] *See* Slip Op. at 7, "we can be confident that no state now has such a law [providing that only white men can serve as jurors]."

Supreme Court, U.S.
FILED
AUG 12 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-2168 (6)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JAMES N. FLEMING,

Petitioner,

v.

W. BEDFORD MOORE, III,

Respondent.

RESPONSE TO MOTION FOR LEAVE TO FILE NAACP AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER'S BRIEF FOR WRIT OF CERTIORARI

Thomas E. Albro, Esq.
SMITH, TAGGART, GIBSON
& ALBRO
105-109 East High Street
Post Office Box 1585
Charlottesville, VA 22901
Counsel for Respondent

APPELLATE PRINTING SERVICES, INC., HERITAGE BLDG., RICHMOND, VA (804) 643-7789

6 P

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

No. 85-2168

JAMES N. FLEMING,

Petitioner,

v.

W. BEDFORD MOORE, III,

Respondent.

RESPONSE TO MOTION FOR LEAVE TO FILE NAACP AMICUS CRUIAE BRIEF IN SUPPORT OF PETITIONER'S BRIEF FOR WRIT OF CERTIORARI

Respondent, W. Bedford Moore, III, objects to the motion for leave to file amicus curiae brief filed by the National Association for the Advancement of Colored People for the following reasons:

1. The issue raised and discussed in the amicus brief was not an issue before the Virginia Supreme Court when it denied Fleming's petition for appeal on March 7, 1986, from which Fleming filed his petition for certiorari. The issue before the Virginia Supreme Court was whether the trial court was in compliance with an earlier Supreme Court order requiring remittitur. Any issues other than those dealing with the remittitur of a state court judgment are not properly before this Court.

2. The issue raised in the NAACP amicus brief was raised in this Court by Fleming in Record No. 84-1740, which petition was denied certiorari. Fleming v. Moore, 87 L.Ed.2d 643 (1985).

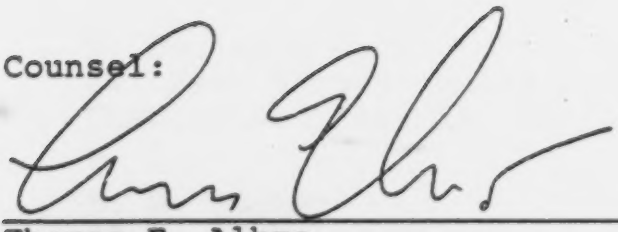
WHEREFORE, Respondent W. Bedford Moore, III, respectfully requests that

the motion for leave to file amicus curiae brief by the National Association for the Advancement of Colored People in support of petitioner's brief for Writ of Certiorari be denied.

W. BEDFORD MOORE, III

By Counsel

Counsel:



Thomas E. Albro
SMITH, TAGGART, GIBSON & ALBRO
105-109 East High Street
Post Office Box 1585
Charlottesville, Virginia 22901
Telephone: (804) 977-4455

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate photocopy of the foregoing Response was mailed this 12th day of August, 1986, to the following counsel of record in this case:

D. Alan Rudlin
W. Jeffery Edwards
HUNTON & WILLIAMS
Post Office Box 1535
Richmond, VA 23221

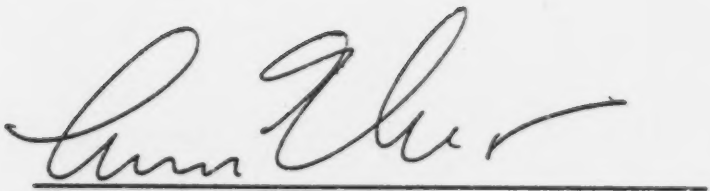
J. Benjamin Dick
421 Park Street, Suite 2
Charlottesville, VA 22901

S. W. Tucker
HILL, TUCKER & MARSH
Post Office Box 27363
Richmond, VA 23261

Gerald G. Poindexter
Surry Courthouse Square
Surry, Virginia 23883

Grover G. Hankins
General Counsel - NAACP
805 Mount Hope Drive
Baltimore, MD 21215

J. Levonne Chambers
Eric Schnapper
NAACP LEGAL DEFENSE AND EDUCATIONAL
FUND, INC.
16th Floor
New York, NY 10013



Thomas E. Albro